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Supreme Court of the United States

October Term, 1977.

No. 77-404

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

JURISDICTIONAL STATEMENT.

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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1977.

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No.

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CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC, AND DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

—

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

—

JURISDICTIONAL STATEMENT.

—

OPINIONS BELOW.

The opinion of the Superior Court of New Jersey, Law Division, declaring *P. L.* 1973, *c.* 363 (*N. J. S. A.* 13:11-9, 10) unconstitutional is not reported (A1). The opinion

of the Superior Court of New Jersey, Chancery Division, in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.* is reported in the official reports at 127 *N. J. Super.* 160 (Ch. 1974), and in the unofficial reports at 316 *A.* 2d 711 (A9). The opinion of the New Jersey Supreme Court, reversing the trial court's decisions in each of the aforesaid cases, is published in the official reports as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975), and in the unofficial reports as *Hackensack Mead. Dev. Com'n v. Municipal L. A.*, 348 *A.* 2d 505 (N. J. Sup. Ct. 1975) (A27). Said opinion is cited as *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.* 451 (1975) in the within Jurisdictional Statement. The opinion of the New Jersey Supreme Court, on remand from this Court, is not yet published in either the official or the unofficial reports (A57). Said opinion is cited as *Philadelphia v. New Jersey*, – *N. J.* – (1977) in the within Jurisdictional Statement.

JURISDICTION.

This matter is brought pursuant to 28 *U. S. C.* § 1257(2) and in the alternative, 28 *U. S. C.* § 1257(3) to set aside two separate judgments of the New Jersey Supreme Court. The first judgment, which upheld the constitutionality of *P. L.* 1973, *c.* 363 against an attack on Commerce Clause grounds, was rendered on November 18, 1975 and entered on the same date. This Court noted probable jurisdiction over the appeal on April 5, 1976, 425 *U. S.* 910 (1976). Following oral argument, this Court vacated the judgment of the New Jersey Supreme Court and remanded the case "for reconsideration in light of the Resource Conservation and Recovery Act of 1976", *Philadelphia v. New Jersey*, – *U. S.* – (1977) (Slip sheet opinion, pp. 1-2) (A54). The second judgment, which was

rendered and entered on June 20, 1977, upheld the constitutionality of *P. L.* 1973, *c.* 363 against an attack on Supremacy Clause grounds, and additionally "reaffirm[ed] the views expressed in our earlier opinion, reported in 68 *N. J.* 451 (1975), as well as the judgment there set forth, supplemented and modified by what is stated above" (A69). A notice of appeal to the Supreme Court of the United States from both judgments was thereafter filed in the New Jersey Supreme Court on July 22, 1977 (A162). The jurisdiction of the Supreme Court of the United States to review this suit (a) by direct appeal is conferred by Title 28, *United States Code*, Section 1257(2), and alternatively (b) by certiorari is conferred by Title 28, *United States Code*, Section 1257(3). Appellants believe the following cases sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the New Jersey Supreme Court in this matter:

Hunt v. Washington State Apple Advertising Commission, – *U. S.* – (1977)
Douglas v. Seacoast Products, Inc., – *U. S.* – (1977)
Jones v. Rath Packing Co., – *U. S.* – (1977)
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Pike v. Bruce Church, 397 *U. S.* 137 (1970)
Huron Cement Co. v. Detroit, 362 *U. S.* 440 (1960)
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Penna. v. West Virginia, 262 U. S. 553 (1923)
Oklahoma v. Kansas Nat. Gas Co., 221 *U. S.* 229 (1911)
Railroad Co. v. Husen, 95 *U. S.* 465 (1977).

STATUTE INVOLVED.

The text of *P. L.* 1973, *c.* 363, the constitutional validity of which is involved in the present suit, reads as follows:

> "The legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.
>
> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act,' P. L. 1973, c. 39."

Said statute is published in the pocket part of Title 13, *New Jersey Statutes Annotated, Section* 1I-9 and 1I-10 at pp. 85-86.

QUESTIONS PRESENTED.

1. Is the interstate movement of solid or liquid waste for purposes of resource recovery, treatment or disposal "commerce" within the meaning of the Commerce Clause?

2. Does a state statute which prohibits the entry into the state of any solid or liquid waste (except garbage to be fed to swine in the state) collected in another state, discriminate against or place and undue burden upon interstate commerce?

3. In reversing an order granting a motion for summary judgment, may an appellate court constitutionally decide the case on its merits without offering the moving parties an opportunity to be heard on the material issues of fact raised by their complaint prior to the final determination?

4. Is a state statute that prohibits persons from bringing solid and liquid waste into a state in conflict with a federal statute that (a) requires cooperation in the establishment of solid waste management plans for interstate regions, and (b) provides for the issuance of federal permits to owners and operators of hazardous waste treatment, storage or disposal facilities?

STATEMENT OF THE CASE.

This case challenges the constitutionality, on Commerce and Supremacy Clause grounds, of a statute which prohibits a person from bringing into New Jersey "any solid or liquid waste which originated or was collected outside the territorial limits of the State. . . ." *P. L.* 1973, *c.* 363.

Legislative efforts to prohibit the treatment or disposal in New Jersey of solid waste collected outside the State were first initiated seven years ago with the introduction of S. 834 in the New Jersey Senate on May 4, 1970.[1] Section 2 of that bill, entitled "An Act to prevent the treatment and disposal within this State of solid waste collected outside this State", provided as follows:

> "Notwithstanding the provisions of any other law to the contrary, no solid waste collected from any location without the territorial limits of this State shall be treated or disposed of in any solid waste disposal facility located within this State."

By written memorandum dated May 8, 1970,[2] the Commissioner of the New Jersey Department of Environmental Protection advised the Governor that the Department supported ". . . the concept of prohibiting the importation of out-of-state garbage" into New Jersey, and recommended that the bill be signed, if passed by the legislature. The reason for the Department's position was explained by the Commissioner as follows:

> ". . . The amount of land available in landfills is rapidly being depleted. It is in the interests of the State to reserve the available land for the disposal of solid wastes originating in the State."

1. Copies of bills introduced in the New Jersey Legislature are available at the New Jersey State Library in Trenton, New Jersey.

2. Said memorandum is contained in the file of the Counsel to the Governor, maintained in the State Archives at the New Jersey State Library, Trenton, New Jersey.

No mention was made of public health or environmental quality.

Although S. 834 passed the Senate, it did not move in the Assembly and died at the end of the legislative session.[3]

A bill almost identical to S. 834, A. 1019, was introduced in the New Jersey Assembly on April 12, 1972. Like its predecessor, A. 1019 expressly prohibited the treatment or disposal in New Jersey of any solid waste collected outside the State.

Less than one month later, on May 4, 1972, a second bill, A. 1132, the Waste Control Act, was introduced by the same Assemblyman. Unlike A. 1019 which contemplated direct statutory prohibition, A. 1132 conferred upon the Commissioner of the Department of Environmental Protection the power to regulate and prohibit the incineration and landfill in New Jersey of solid waste collected outside the State. In his "statement" attached to the bill, the sponsor commented:

> ". . . This bill recognizes that the citizens of New Jersey do not have the luxury of unlimited resources and disposal sites. The bill also reflects an awareness that the continuing use of New Jersey lands for solid waste disposal facilities . . . presents an unfortunate picture of the State, particularly in the Hackensack Meadowlands area."

By memorandum dated October 3, 1972,[4] the President of the New Jersey Public Utilities Commission urged the Governor to veto A. 1132, if passed, due to the potential for retributive action:

> "If New Jersey prohibits waste collected outside the State from being dumped within the State, it may

3. Information with respect to bills introduced in the New Jersey Legislature is available in the New Jersey Legislative Index.

4. See footnote 2, *supra*.

find that reciprocal action will be taken by neighboring states wherein New Jersey disposes of its solid wastes; e.g., Philadelphia dumps in New Jersey and New Jersey dumps in Pennsylvania."

A. 1019 was never adopted, but A. 1132 passed the legislature and was signed by the Governor on February 21, 1973. The adverse recommendation of the Public Utilities Commission was not accepted. Section 4 of the Act granted to the Commissioner of the Department of Environmental Protection the specific

> "power to formulate and promulgate, amend and repeal orders, rules and regulations prohibiting, conditioning and controlling the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State.
>
> *N. J. S. A.* 13:1I-4a

Upon signing the bill, the Governor issued a press release [5] in which he stated that the Waste Control Act represented ". . . a significant step in controlling the daily influx of trash and garbage from adjoining states which threatens to engulf New Jersey's remaining sanitary landfill sites".

Two and one-half months later, on May 7, 1973, at a conference on waste management sponsored by the Tri-State Regional Planning Commission,[6] Grant F. Walton, Director of the Division of Environmental Quality, New

5. Press releases issued by the Governors of New Jersey are now collected and maintained at the New Jersey State Library, Trenton, New Jersey.

6. Said Commission was formed by virtue of an interstate compact between the states of Connecticut, New Jersey and New York C. G. S. A. § 16-339 *et seq.* McK Unconsol. Laws § 830 *et seq.*; N. J. S. A. 32:22B-1 *et seq.*

Jersey Department of Environmental Protection, made reference to the newly-enacted statute, saying:

> "I mentioned that New Jersey had just passed legislation to give us control over the material that comes in from out of state. . . ."
>
> • • •
>
> ". . . The great temptation would be just to prohibit all materials from coming into the state of New Jersey . . . *but we don't feel that is responsible or realistic.*" [7]
>
> (Emphasis added)

The expressed temptation to prohibit was motivated by political rather than environmental concerns for in his prepared address at the Waste Management Conference, Mr. Walton acknowledged the environmental integrity of sanitary landfills and their potential for reclaiming ravaged lands for public recreational use: "The health hazard, water and air pollution and methane gas problems commonly associated with landfills," he said, "can be eliminated through the proper design and operation of the facility . . . Properly done, abandoned surface mines can become parks, playgrounds and golf courses of the future with little or no detriment to the environment." [8]

7. Presentation by Grant F. Walton published in *Proceedings of the Waste Management Conference*, "Partnership for Waste Management", Tri-State Regional Planning Commission, New York, 1973, *p.* 101.

8. *Id.*, at 74.

An identical conclusion was expressed in the New Jersey Solid Waste Management Plan, approved by the United States Environmental Protection Agency as the official State Plan for New Jersey:

> "There is no technological reason why we cannot dispose of solid waste with minimal environmental harm."
>
> • • •
>
> "It is not unusual for a properly designed and constructed sanitary landfill to become an asset to the local area.
>
> • • •

Consistent with Mr. Walton's remarks no action was taken by the Commissioner of the Department of Environmental Protection to prohibit the incineration or landfill in New Jersey of solid waste collected outside the state.

Almost 8 months passed without further visible activity. Then on October 19, 1973, Acting Governor Alfred N. Beadleston published a tersely worded press release saying, in part:

> "I have today directed Commissioner Richard J. Sullivan of the Department of Environmental Protection to initiate immediately the legal process to ban all dumping of out-of-state garbage in New Jersey.
>
> • • •
>
> "[If a ban is not promptly imposed], the people of New Jersey will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up."[9]

8. (Cont'd.)

"The Department of Environmental Protection, under Chapter 39, continues to enforce the Public Health Council State Sanitary Code as it pertains to refuse disposal. That is, the Bureau of Solid Waste Management still has Chapter VIII of the State Sanitary Code with which to regulate and assure nuisance-free operation of disposal sites in conformance with good practice and health standards."

New Jersey State Solid Waste Management Plan (Newark: Planners Associates, Inc., 1970) pp. 2, 71 and 78.

9. The text of the entire press release reads as follows:

"I have today directed Commissioner Richard J. Sullivan of the Department of Environmental Protection to initiate immediately the legal process to ban all dumping of out-of-state garbage in New Jersey. I have taken this action after consultation by telephone with Governor William T. Cahill and with his full support.

This ban will be accomplished either by legislation or by regulation issued by Commissioner Sullivan pursuant to the State Waste Control Act, Chapter 39 of the Public Laws of 1973. The State will proceed under whichever of those two legal methods is faster and more effective.

I have issued this directive after thorough consultation with Commissioner Sullivan and Attorney General Kugler. The ban against the dumping of garbage from either New York or Pennsylvania will be strictly enforced, when it becomes effective, with the full resources of the Department of Environmental Protection and the State Department of Law and Public Safety.

New Jersey cannot continue to tolerate the grave environmental dangers being created by the dumping of garbage in New Jersey from New York or any other state. This is a sovereign State, not a dumping ground, and this State Government will act decisively to protect the health and welfare of its citizens. Not only does out-of-state dumping pose immediate environmental and health problems, but over the long run, the people of New Jersey will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up.

Commissioner Sullivan will proceed immediately to draft the necessary regulation under the Administrative Procedures Act, which prescribes a required timetable of public notice and public hearings. The Legislature will return Nov. 12 and, if it appears that it would be the most expeditious route, will be asked to approve the necessary legislation, under emergency procedures if possible."

Less than a month later, on November 8, 1973, the Commissioner published proposed Rules Governing the Bureau of Solid Waste Management. Section 7:26-1-8 of the proposed Rules contained a provision unconditionally prohibiting the disposal of out-of-state waste in New Jersey.[10]

The New Jersey Department of Environmnetal Protection expressed the reasons for the proposed ban in para-

10. The text of the proposed rule read as follows:

7:26-1.8 Out of State Waste

—1.8.1 No person engaged in the collection and/or haulage of solid waste shall dispose of any solid waste which originated or was collected outside the territorial limits of this State in any solid waste facility located within the territorial limits of this State.

—1.8.2 No person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside the territorial limits of this State.

graph IV of its "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management" (A170). Not unexpectedly, references to public health and environmental quality are virtually non-existent. Rather, the reasons presented for the proposed administrative prohibition were: (1) to assure the availability of landfill acres in New Jersey for solid waste generated in said State, and (2) to stabilize the cost of solid waste collection and disposal for New Jersey residents.[11]

Four days after the publication of the proposed Rules of the Bureau of Solid Waste Management, on November 12, 1973, S. 2367 was introduced in the New Jersey Senate. The stated purpose of the bill was to prohibit the entry into New Jersey of any solid or liquid waste which originated or was collected outside of the state, except garbage to be fed to swine within New Jersey.[12]

The Department of Environmental Protection was requested to submit its comment on the bill to the Office of the Counsel to the Governor. The comment submitted by the Department,[13] was surprisingly candid:

"A. Description of Bill's Effect—

> Amends the existing Waste Control Act of 1973 by reversing the present burden of proof so that out-of-state solid and liquid waste will be banned unless the Department issues regulations permitting same. *No doubt this approach was*

11. This was specifically admitted by Appellees in their Answer to the Complaint filed in this action (A80, 117).

More particularly in the "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management", the Department commented: "The failure on the part of our neighboring states to provide suitable disposal facilities of their own . . . *is increasing the cost of disposal for our own municipalities.*" (A170).

12. When S. 2367 was originally introduced, the clause ". . . except garbage to be fed to swine in the State of New Jersey," was not in the bill.

13. See footnote 2, *supra*.

> *taken—as opposed to an absolute ban—so as not blatantly to traverse the commerce clause of the Federal Constitution.*"
>
> • • •

"E. Departmental Comments—

> *Out-of-state waste is clearly a problem but it is not necessarily insurmountable.* The Bureau of Solid Waste reports that *the major difficulty is that New York 'garbage' competes with the landfill sites in heavily populated areas which will tap out within a few years, in any case.* Thus, whereas such waste comprises no more than a small percentage of the total waste collected in the state, it is approximately 25% of the waste disposed in the New Jersey portion of the New York-New Jersey Metropolitan area. This is the truly critical region for solid waste. However, liquid waste from New York and Pennsylvania may even be needed by New Jersey processing plants, so as to reduce their per unit costs. The bill will clearly permit the Department to issue regulations allowing same where necessary or desirable."
>
> • • •

(Emphasis added)

The "major difficulty" identified by the Department was competition for the purchase of landfill disposal space. Environmental considerations were noticable in their absence.

S. 2367 was passed by the Senate on November 19, 1973, and by the Assembly on November 26, 1973. While the bill was pending before the Governor for his review, Richard W. DeKorte, Counsel to the Governor, wrote to

David Quient, Esquire, City Attorney for Appellant City of Glen Cove (A103), saying:

• • •

> "Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination."

S. 2367 was signed by the Governor on January 2, 1974, *P. L.* 1973, *c.* 363, to become effective February 1, 1974.

On January 21, 1974, appellants filed a complaint attacking the constitutionality of said statute on federal and state constitutional grounds (A77). Their simultaneous application for a temporary restraining order was supported, among other documents, by an affidavit of a licensed professional engineer (A100) which averred that the transportation, treatment or disposal of solid waste in New Jersey in accordance with applicable Federal and New Jersey state and administrative laws, rules and regulations would not pose a threat to the health, welfare and safety of the residents of said state:

> "3. The transportation in New Jersey of solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.
>
> "4. The treatment and disposal in New Jersey of domestic or foreign solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey." [14]

Based upon its conclusion that immediate and irreparable harm would be suffered by appellants if temporary injunctive relief was not granted, the Superior Court of New Jersey, Law Division, issued an Order to Show Cause with Temporary Restraints on January 21, 1974, which, *inter alia*, restrained the State from enforcing the provisions of *P. L.* 1973, *c.* 363 (A105). On the return date of the Order to Show Cause, February 1, 1974, the trial court issued an interlocutory injunction continuing the restraints theretofore issued, and further specifically enjoining the enforcement of *N. J. A. C.* 7:1-4, until its further order [15]

14. The conclusions expressed in said paragraphs 3 and 4 have never been attacked or rebutted. Quite the contrary, they have been confirmed by appellees. See *p.* 17 *infra.*

15. N. J. A. C. 7:1-4, a rule governing the importation of solid and liquid waste from outside New Jersey, was adopted by the Commissioner of the New Jersey Department of Environmental Protection on January 18, 1974, pursuant to authority conferred by *P. L.* 1973, *c.* 363. Said rule, which was adopted as an emergency measure to become effective February 1, 1974, provides, in pertinent part, as follows:

N. J. A. C. 7:1-4.2

"(a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:

(1) Garbage to be fed to swine in the State of New Jersey;

(2) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

(3) Municipal solid waste to be separated, or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thruput of any such facility is to be separated or processed into usable secondary materials; and

(4) Pesticides, hazardous, waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered

(A108). In granting interlocutory injunctive relief, the trial court considered among others, an affidavit of the Deputy Assistant Administrator for Solid Waste Management Programs, United States Environmental Protection Agency (A110), which averred in pertinent part, as follows:

• • •

> "It has not been established to the satisfaction of EPA that the continuation of disposal, in an environmentally sound manner, of solid waste generated outside New Jersey poses any greater immediate health threat to its citizens than the continued disposal of domestically generated solid waste. Therefore, there appears to be no immediate health threat to justify the precipitous passage and implementation of this statute [*P. L.* 1973, *c.* 363] and these regulations. [N. J. A. C. 7:1-4]
>
> • • •
>
> . . . a State importation ban such as that enacted by New Jersey is in conflict with the national policy set forth in Section 206 of the Solid Waste Disposal Act. . . . Moreover, *the continuation of such a restriction would establish an unfavorable precedent which, if followed by a substantial number of other States, would render regional and interstate solutions to solid waste disposal problems impossible to attain.*
>
> • • •
>
> The foregoing is not to say that appropriate standards should not be applied in the areas of treatment and disposal of solid wastes and of land use planning.

15. (Cont'd.)
with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State."
A verbatim copy of the entire rule as same was adopted by the Commissioner appears at A72.

> We strongly favor the adoption of standards applicable to domestic and imported solid wastes so that they apply on an equal basis with out-of-state waste subject to the same statutory and regulatory treatment as domestic waste.
>
> • • •
>
> . . . A single thrust to ban out-of-state wastes impedes rather than enhances environmental quality.
>
> In conclusion, *it is EPA policy that no* municipality or *State should take action to prevent the free flow of waste across* municipal or *state boundaries* provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and state environmental and land use laws, guidelines, regulations, and recognized engineering practices."
>
> (Emphasis added)

A plenary hearing on the merits of appellants' complaint was scheduled by the Court for March 25, 1974.

On February 13, 1974, appellees filed their answer to the complaint in this matter, wherein they specifically admitted that a principal concern of the New Jersey Legislature in adopting *P. L.* 1973, *c.* 363 was to preserve landfill acres in New Jersey for solid waste generated in said State (A91, 119). They further admitted that there is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State, and there is no difference with respect to the disposal of same (A81, 117).

On March 13, 1974, appellants deposed the Principal Environmental Engineer of the Bureau of Solid Waste Management, New Jersey Department of Environmental Protection. During the course of said deposition, the

engineer admitted that the proposed Rules of the Bureau of Solid Waste Management, *N. J. A. C.* 7:26-1 *et seq.* (effective July 1, 1974) (A126-127), were entirely adequate to protect the health, safety and welfare of the people of the State of New Jersey and the quality of its environment.[16] He also revealed that no effort had been made by the Department of Environmental Protection to calculate the total acreage available for sanitary landfill purposes in the State of New Jersey or to identify the location and availability of facilities which presently exist or may hereafter be developed outside the State of New Jersey (A129, 132).

Appellants thereafter moved for summary judgment on two federal constitutional grounds which, in their opinion, raised solely questions of law: (a) *P. L.* 1973, *c.* 363, on its face, discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States, and (b) the Congress of the United States has preempted the narrow field preventing the adoption of laws, ordinances and regulations which prohibit the interstate movement of solid waste for purposes of treatment or disposal (A133).[17] Appellees cross-moved for summary judgment on the same issues, and urged in a portion of their brief filed with the trial court (A135), that summary judgment not be granted to appellants pending a hearing on the merits:

16. Said rules were designed to prohibit dumps and to comprehensively regulate solid and liquid waste disposal facilities. Particular attention was directed toward controlling problems which had regularly been associated with dumps, including (a) dust (b) odor, (c) fire, (d) insects, (e) rodents, (f) scattering of papers and other lightweight materials, (g) gas generation, (h) surface and ground water quality, (i) collection and haulage, (j) open burning, and other related problems.

17. The motion did not seek summary judgment with respect to the many remaining federal constitutional questions raised by the complaint since those questions involved genuine issues of material fact.

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except for affidavits submitted in favor of and in opposition to the issuance of *ad interim* restraints.
>
> • • •
>
> "Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

Pending a determination of the motions, the hearing date was rescheduled to April 15, 1974, if necessary.

On March 25, 1974, the trial court heard oral argument on the cross-motions for summary judgment, and delivered its opinion (A1) granting summary judgment to appellants and striking down *P. L.* 1973, *c.* 363 on the ground that same discriminates against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution of the United States:

> ". . . I find that the statute in question here is attempting to control material that is properly the subject of interstate commerce, that the method of attempting is discriminatory and, therefore, unconstitutional."

On April 23, 1974, appellees filed a notice of appeal (A136), by which they appealed from the trial court's

grant of summary judgment to appellants, but not from the denial of their own motion for summary judgment.

More than 4 months later, on July 26, 1974, appellees moved before the Superior Court of New Jersey, Appellate Division, for a stay of judgment (A138). Said motion was denied by the Court on August 14, 1974 (A140).

Following the submission of briefs by all parties, and prior to argument in the Appellate Division, the appeal was certified directly to the New Jersey Supreme Court and consolidated with *Hackensack Meadowlands v. Mun. Landfill Auth.*[18] by order dated October 7, 1974 (A223). The consolidated cases were argued before the New Jersey Supreme Court on December 2, 1974.

Almost one year later, on November 18, 1975, the New Jersey Supreme Court reversed the judgment of the trial court on the merits, and vacated the injunctive order which had been in effect since the inception of the litigation. Although the Court agreed that certain solid and liquid waste is merchantable and that the transportation and disposal of solid and liquid waste represents a legitimate subject of interstate commerce, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra* at 466-469, it nevertheless upheld the constitutionality of *P. L.* 1973, *c.* 363 on the grounds that same represented a reasonable exercise of the State's police power and did not place an undue burden upon or discriminate against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the Constitution

18. In *Hackensack Meadowlands*, suit was brought by the Hackensack Meadowlands Development Commission and the Department of Environmental Protection to enjoin the Municipal Sanitary Landfill Authority from accepting for disposal in its landfill site located within the Hackensack Meadowlands District any solid waste originating from or collected outside the territorial limits of New Jersey. The Superior Court, Chancery Division, held that the exclusion of out-of-state solid waste from deposit in landfill sites within the state was unconstitutional as representing a discrimination against interstate commerce.

of the United States. It also concluded that Congress did not preempt the field of solid waste disposal (A27).

By its ruling, the New Jersey Supreme Court disposed, on the mertis, of a case concededly involving substantial disputed issues of material fact which had never been heard by the trial court.[19] Since a hearing was not held, there was no testimony from which to make findings of fact with respect to either (a) the legitimacy of the exercise of the State's police power and the nature and degree of the burden imposed upon interstate commerce, or (b) the numerous issues of material fact raised by the remaining counts contained in appellants' complaint. Curiously, such remaining counts were never mentioned by the New Jersey Supreme Court in its opinion.

On November 18, 1975, the same date upon which the case was decided, the New Jersey Supreme Court granted appellants' emergent motion for a stay of judgment and interim injunctive relief pending its further order (A145).

In an effort to remedy the aforesaid procedural impropriety, appellants moved the New Jersey Supreme Court to retain jurisdiction pending a remand of the factual issues to the trial court on an expedited basis (A147). The trial court indicated that it would hold a plenary hearing within two weeks. In the alternative, appellants

19. The trial court granted, as a matter of law, appellants' motion for summary judgment prior to the scheduled hearing date. The only facts presented to the trial court were contained in affidavits in favor of and in opposition to the issuance of interim injunctive relief, and these affidavits, with one exception, were not part of the appendix presented to the New Jersey Supreme Court at the time it decided the case. There was no reason to present said affidavits to the New Jersey Supreme Court since their purpose was solely to support an application for interim injunctive relief and *not* to prove a case involving disputed issues of material fact. Based upon the New Jersey Rules of Court, the only question before the Supreme Court of New Jersey was whether the trial court correctly granted summary judgment to appellants.

sought a stay pending an application for injunctive relief to the Supreme Court of the United States.

On December 11, 1975, the New Jersey Supreme Court denied appellants' motion for a stay, vacated the emergency stay that it had previously issued, effective December 31, 1975, and further

> "Ordered that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further
>
> Ordered that this Court does not retain jurisdiction." (A154).

Based upon this order, appellants were compelled, as a practical matter, to dismiss with prejudice every count in their complaint which had not been specifically resolved by the New Jersey Supreme Court in its decision of November 18, 1975, so that there would unquestionably be a final judgment from which a direct appeal could be taken to the Supreme Court of the United States. In the order pursuant to which the unresolved issues raised by appellants and intervenors complaints were dismissed (A155), the trial court

> "Further Ordered, that, in light of the dismissal of the above counts, and the decision by the New Jersey Supreme Court upholding the constitutionality of *P. L.* 1973, *c.* 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint and Count One of plaintiffs-intervenors complaint, no further proceedings are deemed appropriate by this Court in connection with the above captioned matter."

On December 22, 1975, appellants filed an application for a stay of judgment with Mr. Justice Brennan. Said application was granted on December 31, 1975 (A157). Appellants duly filed a notice of appeal and a jurisdictional statement. Thereafter, probable jurisdiction was noted on April 5, 1976, 425 *U. S.* 910.

On October 21, 1976, thirteen days before the scheduled date of oral argument, the President of the United States signed the Resource Conservation and Recovery Act of 1976, *Pub. Law* 94-580, 42 U. S. C. § 6901 *et seq.*, which amended comprehensively the Solid Waste Disposal Act, 42 U. S. C. § 3251 *et seq.*

At oral argument held on November 3, 1976, a question was posed by Mr. Justice White with respect to the effect of the aforesaid federal legislation on the matter before the Court. Appellants thereafter filed a motion seeking leave to submit a supplemental brief dealing with the effect of the Resource Conservation and Recovery Act of 1976 upon the validity of *P. L.* 1973, *c.* 363. Said motion was granted by order dated November 15, 1976 and supplemental briefs were filed simultaneously by both parties.

On February 23, 1977, a majority of the United States Supreme Court issued a *per curiam* opinion vacating the judgment of the New Jersey Supreme Court and remanding the case for reconsideration in light of the Resource Conservation and Recovery Act of 1976, *Philadelphia v. New Jersey*, – *U. S.* – (1977) (Slip sheet opinion, pp. 1-2) (A54), saying, in pertinent part, as follows:

> "While federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, analysis of pre-emption issues depends primarily on statutory and

not constitutional interpretation. Therefore, it is appropriate that the federal pre-emption issue be resolved before the constitutional issue of alleged discrimination against or undue burden on interstate commerce is addressed. We think it appropriate that we have the views of the New Jersey Supreme Court on the question whether or to what extent the Resource Conservation and Recovery Act of 1977 pre-empts the New Jersey statute." [20]

Since the case was remanded for consideration of a statute enacted after probable jurisdiction was noted on April 5, 1976, the questions raised by the appeal from the November 18, 1975 judgment of the New Jersey Supreme Court have not yet been resolved.

Although the stay issued by Mr. Justice Brennan was in effect for more than a year immediately preceding the judgment of the United States Supreme Court, appellees never moved for an order to modify or vacate same. However, 20 days after this Court issued its opinion, on March 15, 1977, appellees moved the New Jersey Supreme Court for clarification or, in the alternative, ". . . for a stay of any lower court injunctive order which may be found presently to bar enforcement of Chapter 363 . . . ." (A175).[21] Appellees further moved for an expedited schedule in connection with the remand.[22]

20. Mr. Justice Powell, speaking for four members of the Court, dissented commenting, "We should decide this case on the merits and not burden the parties and the Supreme Court of New Jersey by a remand which unnecessarily creates delay, expense, and uncertainty."

21. On the date appellees' motion was filed, the United States Supreme Court—and not the New Jersey Supreme Court—still had jurisdiction of the appeal. Pursuant to Rule 59 of the Rules of the United States Supreme Court, jurisdiction remains vested in the Supreme Court until the issuance of its mandate, an event occurring 25 days after the issuance of its opinion.

22. The motion for acceleration was not opposed by appellees.

By order dated April 4, 1977, the New Jersey Supreme Court granted appellees' motion for acceleration, but reserved decision on the application for a stay:

> "This matter having been duly presented to the Court, it is . . . further
>
> ORDERED that the decision as to defendants' motion for relief is reserved at this time in view of the accelerated schedule fixed herein; and it is further
>
> • • •
>
> ORDERED that this matter be set down on Tuesday, May 10, 1977, for argument on the merits and as to whether defendants' motion for a stay (M-725-76) should be granted." (A176)

Following oral argument, the New Jersey Supreme Court handed down its opinion on June 20, 1977, holding that *P. L.* 1973, *c.* 363 was not pre-empted, under the Supremacy Clause, by the Resource Conservation and Recovery Act of 1976 (A57). However, it stayed its judgment for a period of 30 days "to afford plaintiffs full opportunity to apply to the Supreme Court of the United States for a stay of judgment". *Philadelphia v. New Jersey* — *N. J.* — (1977) (slip opinion, p. 19) (A69).

Appellants duly filed an application for a stay of judgment with Mr. Justice Brennan. Said application was granted on July 18, 1977 (A160).

THE QUESTIONS ARE SUBSTANTIAL.

A.

The Interstate Movement of Solid or Liquid Waste for Purposes of Resource Recovery, Treatment or Disposal Is Commerce Within the Meaning of the Commerce Clause.

In the proceedings before the New Jersey Courts, appellees argued that solid and liquid waste are not legitimate subjects of interstate commerce, and therefore are not within the purview of the Commerce Clause. This contention was rejected below, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 64 *N. J.* 451, 467 (1975), and is wholly unsupportable in law and in fact.

Subjects of interstate commerce are determined by ". . . practical consideration and the established course of business." *Foster-Fountain Packing Co. v. Haydel*, 278 *U. S.* 110 (1928); *Shafer v. Farmers Grain Co.*, 268 *U. S.* 189, 198 (1925); *Public Utilities Comm. v. Landon*, 249 *U. S.* 236, 245 (1919); *Rearick v. Pennsylvania*, 203 *U. S.* 507, 523 (1906). This Court has consistently defined commerce in broad terms to include all commercial intercourse, including the component parts thereof, *Dahnke-Walker Co. v. Bondurant*, 257 *U. S.* 282, 290 (1921). Thus, the transmission of electric current, *FPC v. Florida Power & Light Co.*, 404 *U. S.* 453, 458 (1972) and radio waves, *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 *U. S.* 266, 279 (1933), pastured cattle meandering across a state line, *Thorton v. United States*, 271 *U. S.* 414 (1926), the interstate movement of petroleum, *Pipe Line Cases*, 234 *U. S.* 548, 560 (1914) and telegraphic communications by wire, *Telegraph Co. v. Texas*, 105 *U. S.* 460, 464 (1882), have all been treated as commerce in a federal constitutional sense.

Not surprisingly, the proposition that solid waste collection and disposal is commerce has already been established by the federal courts.

In *United States v. Pennsylvania Refuse Removal Assn.*, 242 F. Supp. 794 (E. D. Pa. 1965), certain defendants were indicted and convicted for price fixing, allocating customers and rigging bids in connection with a refuse removal business in the Greater Philadelphia area in violation of the Sherman Anti-Trust Act. That Act provides, in pertinent part, "Every . . . conspiracy, in restraint of trade or commerce among the several states, . . . is declared to be illegal." 15 *U. S. C.* § 1.

The Court held that the disposal in New Jersey of substantial quantities of refuse collected in Pennsylvania constituted an activity within the flow of interstate commerce. In responding to defendants' argument that a worthless commodity like trash cannot be the subject of "trade or commerce" as those terms are used in the Sherman Act, the Court observed:

> "That argument misses the point. Here, the real subject of 'trade or commerce' was not worthless debris, but the valuable service of removing and disposing of it. Since *services are encompassed within the meaning of the words 'trade or commerce'* as used in the Act, United States v. Nat'l Ass'n of Real Estate Boards, 339 U. S. 485, 488-492, 70 S. Ct. 711, 94 L. Ed. 1007 (1950), the defendants position has no merit."
>
> *United States v. Pennsylvania Refuse Ass'n., 242 F. Supp., supra*, at 700 (Emphasis added).

The decision of the Federal District Court was affirmed by the Court of Appeals for the Third Circuit which

succinctly stated: ". . . refuse transported from Pennsylvania to New Jersey and disposed of in the latter state . . . was plainly a proper subject of interstate commerce." *United States v. Pennsylvania Refuse Removal Ass'n.*, 357 *F. 2d* 806, 808 (3 Cir. 1966). Certiorari was denied by this Court, 384 *U. S.* 961 (1966).

While it is thus clear that the valuable service of collecting and disposing of solid waste is an activity in interstate commerce, it is also clear that solid waste itself is often a merchantable commodity.

In *Hackensack Meadowlands v. Mun. Landfill Auth.*, 127 *N. J.* Super. 160, 170 (Ch. Div. 1974), rev. other grnds. 68 *N. J.* 451 (1975), the companion case to the within matter, Judge (now Justice) Schreiber rejected appellees argument that solid and liquid waste is neither merchantable nor a legitimate subject of interstate commerce: ". . . refuse may be utilized for construction, landfill, recycling of paper, bottles and metal and production of electricity." The New Jersey Supreme Court agreed, saying, ". . . certain types of solid waste may have legitimate market value for recycling or other purposes." *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 467.

Appellees admit that solid waste collected outside New Jersey has been disposed of at sanitary landfill facilities within the State (A170), and that certain communities and industries in New Jersey dispose of all or a portion of their solid waste outside the State of New Jersey (A131-132, 181-186). The City of Yonkers, New York and Appellant City of Glen Cove have also purchased disposal space from private solid waste disposal public utilities in New Jersey, *Hackensack Meadowlands v. Mun. Landfill Auth.*, 68 *N. J.*, *supra*, at 476 (A50, 193). In addition automobile hulks, being a form of bulky waste,

N. J. A. C. 7:26-1.43, regularly move in interstate commerce, *Alexandria Scrap Corporation v. Hughes*, 426 *U. S.* 794 (1976). Indeed, the House Report on the Resource Conservation and Recovery Act of 1976 candidly asserts "that most of our discarded materials have at some time entered the flow of interstate commerce." [23] It is part of the established course of business.

Governed by the aforesaid authorities, the interstate movement of solid waste for purposes of resource recovery, treatment or disposal unquestionably involves commercial intercourse.

Appellants' solid waste collection and disposal companies are New Jersey public utility corporations subject to regulatory control by the Board of Public Utility Commissioners, *N. J. S. A.* 48:2-13, *N. J. S. A.* 48:13A-1 *et seq.* Although a major component of their business activity is service, see *N. J. S. A.* 48:13A-2, they may also engage in the sale of methane gas, steam or other power-generating sources and recovered materials such as paper, glass, copper, steel, tin and aluminum (A198, 206).

In a very real sense, appellant solid waste disposal companies which operate sanitary landfills derive their principal business income from selling space for disposal purposes rather than from providing a service. The cost of operating sanitary landfills in an environmentally sound manner is usually quite substantial (A197, 212). Thus the New Jersey Legislature, in the Solid Waste Management Act, *N. J. S. A.* 13:1E-1 *et seq.* felt compelled to observe:

> "The Legislature recognizes that solid waste and recycling facilities will be financed through long term borrowing which requires the negotiation of long term contracts with municipalities and other solid

23. House Report No. 94-1491 accompanying HR 14496 (Comm. on Interstate and Foreign Commerce), at 9.

waste collectors to guarantee the flow of solid waste to such facilities."

N. J. S. A. 13:1E-2c

If prevented from obtaining sufficient minimum quantities of solid waste, the business of Kinsley's and of other appellant sanitary landfill owners will be greatly diminished or destroyed (A208-209, 212-213, 216, 219), *Foster-Fountain Packing Co. v. Haydel*, 278 *U. S. supra*, at 8. This result would be particularly harsh and inequitable in the present case since expenditures for environmental controls approximating $500,000 have already been made at appellant Kinsley's Landfill, Inc. sanitary landfill site upon the direction of the Department of Environmental Protection (A212). The improvements would not have been made but for a long term contract with the City of Philadelphia (A212).

Appellant Landfill and Development Company is in a similar position (A196-197, 216). Unless *P. L.* 1973, *c.* 363 is struck down, it will lose approximately $700,000 in annual gross income (A215).

Moreover, if the interstate movement of solid waste for purposes of resource recovery, treatment or disposal is not commerce, then individual states can adopt repressive laws with impunity, thereby materially affecting channels of interstate commerce in solid waste.

Since probable jurisdiction was noted by this Court on April 5, 1976, a statute was passed by the Louisiana Legislature to proscribe the transportation of

> "any waste material which originated or was collected outside the territorial limits of the state into Louisiana with the intent to bury, store or otherwise dispose of such wastes in Louisiana until the office of health services and environmental quality of the Department of Health and Human Resources has determined that such action can be permitted without endangering the health, safety and welfare of any member of the public or animal life."

Prior to the adoption of said statute, seven states had adopted laws which, to varying degrees, prohibited the disposal of solid waste collected in another state.[24] Three other states imposed various regulatory limitations.[25]

If each state was free to pass such laws, commerce in solid waste collection and disposal services could be brought to a halt at state lines.

B.

P. L. 1973, c. 363, on Its Face Discriminates Against and Directly Burdens Interstate Commerce.

The plain and unambiguous language of *P. L.* 1973, *c.* 363, entitled:

> "An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State . . . ,"

reveals that its sole intent and purpose is to impose an immediate, absolute and complete ban upon the movement into or through New Jersey of any solid or liquid waste which originated or was collected outside the State. Treatment of liquid waste, processing of solid waste, and dis-

24. Maine, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Vermont.

On December 30, 1974, the Commonwealth of Pennsylvania enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. This legislation was surely prompted by, and retaliatorily directed against, the prohibitory legislation adopted in New Jersey.

25. Delaware, Illinois and Louisiana.

posal or interstate movement of all waste collected outside New Jersey is equally prohibited. Conversely, no attempt whatsoever has been made in the statute to control, regulate or prohibit the movement, treatment, processing or disposal of solid or liquid waste which originates or is collected within the State of New Jersey.

Activities in interstate commerce are not, by that fact alone, immune from reasonable regulations adopted by a state or local government pursuant to the exercise of its reserved police power. *U. S. Const.*, Amend. 10. Absent controlling federal legislation, the Commerce Clause does not deprive the states of the power to regulate matters of legitimate local concern in areas where uniformity of regulation is not necessary, even when interstate commerce is, to some measure, regulated or affected thereby, *Southern Pacific Co. v. Arizona*, 325 *U. S.* 761, 767 (1945).

However, in exercising its power, a state must be reasonable in its requirements, promote its objectives without discrimination, and not go beyond the necessities of the particular case, *Plumley v. Massachusetts*, 155 *U. S.* 461, 471 (1894), *Schollenberger v. Pennsylvania*, 131 *U. S.* 1 (1898), *Savage v. Jones*, 225 *U. S.* 501, 525 (1912), *Bourjois, Inc. v. Chapman*, 301 *U. S.* 183, 187 (1937), *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951), *Great A & P Tea Co. v. Cottrell*, 424 *U. S.* 366 (1976). As stated by Mr. Justice Clark in *Cities Service Co. v. Peerless Co.*, 340 *U. S.* 179, 186-187 (1950):

> "The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest and that the local interest at stake outweigh whatever national interest there might be in the prevention of the state restrictions."

See also *Pike v. Bruce Church Inc.*, 397 *U. S.* 137, 142 (1970); *Hunt v. Washington State Apple Advertising Commission*, – *U. S.* – (1977).

In approaching Commerce Clause questions, this Court has consistently determined for itself whether a regulation represents a valid exercise of the State's police power, or whether it is really and substantially a regulation of interstate commerce, *Asbell v. Kansas*, 209 *U. S.* 251, 256 (1908). Mr. Justice Reed emphasized the Court's responsibility in this area in *Best & Co. v. Maxwell*, 311 *U. S.* 454, 455-456 (1940) where he commented:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

In *Dean Milk Co. v. Madison*, 340 *U. S.* 349, 354 (1951), this Court struck down an ordinance of the City of Madison, Wisconsin, which prohibited the sale of milk as pasteurized unless it was processed and bottled at an approved pasteurization plant within a five mile radius from the central square of Madison. In response to Madison's argument that the ordinance was aimed simply at protecting the health of the community, Mr. Justice Clark wisely noted that to sustain an ordinance simply because it denominates itself

> ". . . a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."

The aforesaid principles were applied in *Railroad Co. v. Husen*, 95 *U. S.* 465 (1877) where this Court struck down a Missouri statute which prohibited the entry of Texas, Mexican or Indian cattle into any county in the State between the first day of March and the first day of December of each year.

Speaking for a unanimous Court, Mr. Justice Strong announced the general rule governing sanitary and health laws as follows:

> "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection.
>
> *Railroad Co. v. Husen*, 95 *U. S. supra*, at 472.

Applying this rule to the statute of Missouri, Mr. Justice Strong found a clear attempt to regulate interstate commerce:

> "It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute,

> we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."
>
> *Railroad Co. v. Husen*, 95 *U. S. supra*, at 473.

In *Plumley v. Massachusetts*, 155 *U. S., supra*, at 469, Mr. Justice Harlan had occasion to discuss the holding in the *Railroad Co.* case. He noted that the object and effect of said statute ". . . was to meet at the borders of Missouri a *large and common subject of commerce* and prohibit its crossing the state line during the larger part of each year. . . ." (Emphasis added.)

A statute enacted to prevent the sale of unwholesome meat was considered and struck down in *Brimmer v. Rebman*, 138 *U. S.* 78 (1891). The statute declared it to be unlawful to offer for sale within Virginia any beef, veal or mutton, from animals slaughtered one hundred miles or more from the place at which it is offered for sale unless previously inspected and approved by local inspectors. Inspection was not required of fresh meats from animals slaughtered within one hundred miles from place of sale.

Rejecting the state's contention that the statute represented a valid police regulation designed to protect the public health, Mr. Justice Harlan stated:

> "Whether there shall be inspection or no, . . . is made to depend entirely upon the place where the animals from which the beef, veal or mutton is taken, were slaughtered . . . . [A state] may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States.
>
> *Brimmer v. Rebman*, 138 *U. S., supra*, at 82.

See also *Minnesota v. Barber*, 136 *U. S.* 313 (1890) and *Scott v. Donald*, 165 *U. S.* 58 (1897).

In *Rasmussen v. Idaho*, 181 *U. S.* 198 (1901), this Court upheld an Idaho statute which empowered the Governor of Idaho to regulate or prohibit the importation into the state of sheep from localities outside the state where scab or other infectious disease has become epidemic. Speaking for a unanimous Court, Mr. Justice Brewer distinguished the *Railroad Co.* case upon which the plaintiff in error in *Rasmussen* largely relied:

> "It will be perceived that *the act in Railroad Co. v. Husen was an absolute prohibition* operative during eight months of the year. *It was an act* continuous in its force; provided for no inspection, and was *predicated on the assumption that the State had the right to exclude* for two-thirds of each year *the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not.*
>
> In the case before us the statute makes no absolute prohibition of the introduction of sheep, but authorizes the Governor to investigate the condition of sheep in any locality, and, if found to be subject to scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the State as shall seem to him, after conference with the State sheep inspector, to be necessary."
>
> *Rasmussen v. Idaho*, 181 *U. S. supra.* at 201 (emphasis added)

A similar quarantine act was considered in *Oreg.-Washington Co. v. Washington*, 270 *U. S.* 87 (1926). The Washington Director of Agriculture, with the approval of the Governor, forbade the importation into the state of alfalfa hay or meal (except in sealed containers) from

designated counties outside the state in which, upon inspection, a weevil injurious to the alfalfa plant was found. After reciting the general rule that, absent arbitrariness or discriminatory motive, a state may prevent the introduction within its borders of human beings, animals or plants which may cause disease, injury or destruction to the State's inhabitants and resources, this Court upheld the statute commenting:

> "We think that here the investigation required by the Washington law and the investigation actually made into the existence of this pest and its geographical location makes the law a real quarantine law, and not a mere inhibition against importation of alfalfa from a large part of the country without regard to the conditions which might make its importation dangerous."
>
> *Oreg.-Washington Co. v. Washington* 270 *U. S., supra,* at 96.

The New Jersey statute in question imposes an unlimited prohibition without regard to condition. It is an embargo. There is no provision for inspection or for any other deliberative process *prior* to exclusion. The statute is erroneously predicated on the assumption that a state has the right to exclude the introduction of all kinds of solid and liquid waste, whether likely to impair public health and environmental quality or not. *Rasmussen v. Idaho*, 181 *U. S., supra,* at 201.

As in the *Railroad Co.* case, *P. L.* 1973, *c.* 363, is neither a quarantine law nor an inspection law; and like the statute in that case, *P. L.* 1973, *c.* 363 says to all natural persons and to all transportation companies: "You shall not bring into the State solid or liquid waste of any nature or description, for any purpose whatsoever, no matter whether it does an injury to the inhabitants of the State

or not; no matter whether it does an injury to the quality of the environment or not; and if you do bring it in even for the purpose of carrying it through the State without unloading it you shall be subject to extraordinary liabilities."

The fact that *Railroad Co. v. Husen* dealt with cattle and not with solid waste is neither material nor distinguishable. The principle is identical in each case; once an activity is legitimately in interstate commerce there can be no discrimination. *Best & Co. v. Maxwell,* 311 *U. S.* 454 (1940); *Head v. New Mexico Board,* 374 *U. S.* 424, 429 (1963).

A proscription against discrimination was similarly noted in the leading environmental case *Huron Cement Co. v. Detroit,* 362 *U. S.* 440 (1960), where an action was instituted by a corporation engaged in operating federally licensed steam vessels in interstate commerce to enjoin the enforcement of certain provisions of the Smoke Abatement Code of the City of Detroit. Finding that the ordinance applied equally to all ships and did not destroy the right of free passage, this Court held that the ordinance was a valid exercise of the state's police power:

> ". . . state regulation based on the police power, *which does not discriminate against interstate commerce* or operate to disrupt its required uniformity, may constitutionally stand.
>
> "It has not been suggested that the local ordinance, applicable alike to any person, firm or corporation within the city, discriminates against interstate commerce as such. It *is a regulation of general application,* designed to better the health and welfare of the community . . . ." *Huron Cement Co. v. Detroit,* 362 *U. S., supra,* at 448 (Citations omitted, emphasis added.)

Although a smoke abatement ordinance enacted to promote the health and welfare of a city's inhabitants will generally support an exercise of the police power, the power to adopt such ordinances is not unlimited.

> "The basic limitations upon local legislative power in this area are clear enough. The controlling principles have been reiterated over the years in a host of this Court's decisions. *Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action . . . , or unduly burdensome on* maritime activities or *interstate commerce. . . .*"
>
> *Huron Cement Co. v. Detroit,* 362 *U. S. supra,* at 443 (Citations omitted, emphasis added).

The Court in *Huron* stressed the fact that the local ordinance there in question was applicable alike to all persons, firms and corporations. Had the ordinance been discriminatory, it would have been struck down.

Appellants respectfully contend that *P. L.* 1973, *c.* 363, while outwardly cloaked "in the currently fashionable garb of environmental protection", *Douglas v. Seacoast Products, Inc.,* — *U. S.* — (1977), is actually no more than a legislative effort to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents, *H. P. Hood & Sons, Inc. v. DuMond,* 336 *U. S.* 525, 538 (1949).

The New Jersey Department of Environmental Protection explained the process this way:

> "In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban

on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collection of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. *This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburban and rural areas.*" (A170) (emphasis added)

An identical sentiment was expressed by Acting Governor Beadleston who, on October 19, 1973, directed the Commissioner of the Department of Environmental Protection to initiate a ban upon the disposal in New Jersey of out-of-state garbage: ". . . the people of New Jersey," he said, "will be forced to pay much higher costs for waste removal because available landfill dumping areas are filled up", See p. 10, n. 9 *supra*. The record demonstrates overwhelmingly that the motivation for imposing the embargo was economic rather than environmental.

Appellees admit that in enacting *P. L.* 1973, *c.* 363, a principal concern of the New Jersey Legislature was to preserve landfill areas in New Jersey for solid waste generated in the State (A 91, 119). This it cannot constitutionally do.

In *Penna. v. West Virginia*, 262 *U. S.* 553, 597-598 (1923), a West Virginia statute prohibited the exportation of its natural gas unless an adequate supply was available to meet the needs of its citizens. Although the Supreme Court of the United States recognized that the gas supply was a natural product of the State and would be insufficient to meet the needs of the State if exportation was allowed, the statute had to fall because it represented "an attempt to regulate the interstate business to the advantage of the local customers."

Similarly, in *Oklahoma v. Kansas Nat. Gas Co.*, 221 *U. S.* 229, 255 (1911), this Court declared unconstitutional an Oklahoma "conservation" statute preventing a pipeline company from transporting natural gas outside the state:

> "If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principal? Thus, enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one state has it, all States have it; *embargo may be retaliated by embargo and commerce will be halted at state lines.* And yet we have said that 'in matters of foreign and interstate commerce there are no state lines'. In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of *each State is made greater by a division of its resources, natural and created, with every State,* and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court." (Emphasis added)

See also *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (W. D. Tex. 1966), aff'd 385 U. S. 35 (1966).

The potential for retaliation is not a mere theoretical possibility in the present case. The Commonwealth of

Pennsylvania has already enacted legislation to prevent the disposal in that Commonwealth of solid waste collected from any location in another state that does not accept solid waste from Pennsylvania. 35 *P. S.* § 6007 *et seq.* The legislation was intended to be retaliatory against New Jersey in operation and effect (A220).

Exclusionary and retaliatory legislation is destructive to the achievement of national goals. Such enactment places the well-being of a few over the well-being of the whole, and can lead to the kind of isolationism that the commerce clause was intended to prevent.

Mr. Justice Cardozo expressed the principal eloquently in *Baldwin v. G. A. F. Seelig,* 294 *U. S.* 511, 523 (1935). In declaring unconstitutional a statute which prohibited the sale in New York of milk purchased in another state at a price lower than the minimum prescribed by the New York statute, he observed:

> "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

A statute which facially prohibits entry without regard to condition is ". . . hostile in conception as well as burdensome in result". *Polar Ice Cream & Creamery Co. v. Andrews,* 375 *U. S.* 361, 377 (1964). It represents discrimination of the most basic kind, and is devoid of any legitimate local concern.

But even if, for the sake of argument, a legitimate local concern is found, that does not end the inquiry: "When discrimination against commerce . . . is demonstrated" said Mr. Chief Justice Burger less than 3 months ago, "the burden falls on the State to justify it both in

terms of local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Advertising Commission,* — *U. S.* — (1977).

Appellees have argued that a prohibition against out-of-state solid waste will reduce volume and thereby preserve further acreage from use as disposal sites. There are two inherent fallacies with this reasoning. Firstly, sanitary landfills can be operated without any "reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility." 42 *U. S. C.* § 6944. Secondly, *any* prospective use of land is subject to objection on the same grounds. For example, the erection and operation of a manufacturing plant can be said to "forever ruin virgin land" and, if not properly regulated, to cause a threat to public health or environmental quality.

For the same reasons, appellees cannot justify the statute on account of the unavailability of nondiscriminatory alternatives. If the environmental integrity of sanitary landfills can be reasonably controlled by the promulgation and enforcement of appropriate regulations, then there is no justification for discrimination.

Although countless opportunities were presented, appellees never contended by any affidavit that (a) the transportation, treatment or disposal of solid or liquid waste in accordance with applicable federal and state laws and regulations poses any material threat to the health, welfare and safety of the people of New Jersey or to the quality of its environment; (b) an unsuspecting public will be deceived or defrauded by the transportation, treatment or disposal of solid or liquid waste collected in another state; or (c) the inherent condition of solid waste

is such that it will always spread pestilence and disease. Quite to the contrary, appellees have admitted that properly designed and regulated sanitary landfills can be operated with no reasonable likelihood of harm to the public or to the environment (A127).

Interstate disposal of solid waste has been carried on, without interruption, for many years. During that period, state regulations have applied equally to all solid waste regardless of the place of its collection.

The interstate transportation of solid and liquid waste for treatment and disposal represents a legitimate, indeed a necessary and vital, activity in interstate commerce, which should not be disturbed.

C.

Appellants Were Unconstitutionally Denied a Plenary Hearing on the Merits of Their Claim.

In granting appellants' motion for summary judgment on March 25, 1974, the New Jersey Superior Court, Law Division, declared *P. L.* 1973, *c.* 363 unconstitutional as a matter of law on the ground that same discriminates against interstate commerce.

The statements made by Mr. Justice Brennan, when he sat upon the New Jersey Supreme Court, in *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N. J.* 57, 74 (1954), continue to represent the definitive expression of the standards of decision governing the grant or denial of a summary judgment motion:

> "It is designed to provide a prompt business-like and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the

> motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> • • •
>
> The standards of decision governing the grant or denial of a summary judgment emphasize that *a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.* At the same time, the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one." (Emphasis added)

Appellants' motion for summary judgment was based only upon those Commerce Clause issues which did not involve questions of material fact. They, like appellees, acknowledged the existence of other issues upon which summary judgment could not be granted (A135).

The trial judge's opinion reveals his determination as a matter of federal constitutional law (a) that the transportation of solid or liquid waste across state lines is a legitimate subject of interstate commerce, and (b) that *P. L.* 1973, *c.* 363, on its face, discriminates against interstate commerce. Had the trial court not reached those conclusions, appellants' motion for summary judgment would have been denied, and the plenary hearing scheduled for April 15, 1974, would have been conducted.

By their notice of appeal (A136) appellees appealed to the Superior Court of New Jersey, Appellate Division:

> ". . . from the final judgment of the Superior Court, Law Division, Mercer County, entered on March 26, 1974, by the Honorable George Y. Schoch, declaring *P. L.* 1973, *c.* 363 unconstitutional as violative of Art. 1, Section 8, Clause 3 of the Constitution

of the United States in favor of plaintiffs, City of Philadelphia, Pennsylvania, City of Glen Cove, Long Island, New York, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc."

Said notice of appeal also contained a certification that a plenary hearing had never been held before the trial court:

> "I hereby certify that there was no testimony taken in the above case. The matter was decided on summary judgment."

Appellees did *not* appeal from the denial of their cross-motion for partial summary judgment. If they did, and leave to file an interlocutory appeal was granted by the Superior Court, Appellate Division, the only relief to which appellees would have been entitled was a partial summary judgment and a remand for a hearing of the numerous remaining issues of material fact.

Although the New Jersey Supreme Court agreed that the transportation and disposal of solid waste represented a legitimate subject of interstate commerce, it did not agree that *P. L.* 1973, *c.* 363 discriminated against interstate commerce. However, instead of reversing the decision of the trial court and remanding the matter for a hearing on the material factual issues presented by the complaint, it disposed of the entire matter by upholding the constitutionality of the statute. Appellants were thereby entirely deprived of an opportunity to present evidence on the reasonableness of the exercise of the State's police power and the extent of the burden upon

interstate commerce. They were also deprived of their right to present evidence with respect to the numerous non-Commerce Clause issues raised by their complaint.

This result lacked fundamental fairness. Appellees had never urged that they were entitled to judgment, as a matter of law, on the merits of the entire action. Quite to the contrary, they specifically argued to the trial court that there were numerous unresolved questions of material fact (A135):

> "At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except affidavits submitted in favor of and in opposition to the issuance of *ad interim* restraints.
>
> • • •
>
> Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the effect on interstate commerce."

Appellants petitioned the New Jersey Supreme Court to reconsider their decision. They pointed out that a plenary hearing had never been held on any issue raised by the complaint, including the reasonableness of the exercise of the State's police power and the extent of its burden upon interstate commerce, and that *P. L.* 1973, *c.*

363 was not being attacked on Commerce Clause grounds alone.[26]

After considering appellants' arguments, the New Jersey Supreme Court remanded the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate. . . ." (A154). No guidance was given to the trial court as to what proceedings, if any, might be "deemed appropriate" by the New Jersey Supreme Court in light of its decision, on the merits, that *P. L.* 1973, *c.* 363 represented a reasonable exercise of the State's police power and did not unreasonably burden interstate commerce. Said decision was neither altered nor amended in connection with the remand. In addition, the Court refused to retain jurisdiction and specifically prohibited the trial court from granting any interim injunctive relief. After effectively depriving appellants of their day in court on the merits of their complaint, the Court also foreclosed appellants from pursuing procedural remedies in the trial court.

The net effect of these rulings was not only to place appellants in a substantially worse position than they would have been in had their motion for summary judgment initially been denied by the trial court, but also to deprive them of a most basic and fundamental right: appellants were never afforded an opportunity to be heard prior to a final determination by the New Jersey Supreme Court that *P. L.* 1973, *c.* 363 (a) represented a reasonable exercise of the State's police power, and (b) did not unreasonably burden interstate commerce. In addition, they were foreclosed from obtaining injunctive relief pending a resolution of ". . . such further proceedings, if any, that . . . [the trial] Court may deem appropriate . . . ."

26. Separate counts in the complaint challenged *P. L.* 1973, *c.* 363 on due process, equal protection of the laws and impairment of the obligation of contract grounds, among others.

As a practical consequence of this action,[27] appellants were constrained to dismiss, with prejudice, each and every count in their complaint which had not been directly addressed by the New Jersey Supreme Court, so that a direct appeal could be taken to this Court.

Appellants respectfully contend that they have been denied due process of law by the New Jersey Supreme Court, in violation of the 5th and 14th amendments to the Constitution of the United States, and in contravention of the decisions of this Court.

The principle of federal constitutional law applicable to the case at bar has been reiterated time and time again by the United States Supreme Court:

> "The fundamental requisite of due process of law is the opportunity to be heard."
>
> *Grannis v. Ordean*, 234 *U. S.* 385, 394 (1914); *Mullane v. Central Hanover Tr. Co.*, 339 *U.S.* 306 (1950).

An opportunity to be heard includes an opportunity to present a case and to be heard in its support. *Brinkerhoff-Faris Co. v. Hill*, 281 *U. S.* 673, 681 (1930). Although appellants scrupulously followed the procedural rules inhering in the courts in the State of New Jersey, they were entirely deprived of an opportunity to be heard at a meaningful time and in a meaningful manner in order to defend their substantive right. They had no opportunity to be heard on the merits of any issue of material fact raised by their complaint prior to the final determination.

27. In the event the *status quo* was not maintained, but rather altered by the revocation of the interlocutory injunction issued by the trial court, appellants would have suffered immediate and irreparable harm. This appears to be consistent with the conclusion reached by Mr. Justice Brennan, who twice stayed the mandate of the New Jersey Supreme Court.

Rhodes v. Houston, 202 *F. Supp.* 624 (Neb. 1962), aff'd 309 F. 2d 959 (8th Cir. 1962), *cert. den.* 372 *U. S.* 909 (1963), 383 *U. S.* 971 (1966).

The denial of this fundamental right was raised to the New Jersey Supreme Court at a conference meeting in the presence of appellees on November 18, 1975, the very same day that the case *sub judice* was decided. Accordingly, the additional federal claim presented by the within due process argument was raised by appellants at their very first opportunity. *Brinkerhoff-Faris Co. v. Hill*, 281 *U. S.*, *supra*, at 678. It was asserted a second time less than two weeks later in a motion addressed to the New Jersey Supreme Court which resulted in the aforesaid order remanding the case to the trial court ". . . for such further proceedings, if any, that that Court may deem appropriate . . . ."

Upon appellants' consent to dismiss all counts of its complaint *except* Counts I, VII and XIX, no further proceedings were deemed appropriate by the trial court, (A343),

> ". . . in light of . . . the decision by the New Jersey Supreme Court upholding the constitutionality of P. L. 1973, c. 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VII and XIX of plaintiffs' complaint . . . ."

The action taken by the New Jersey Supreme Court in upholding the constitutionality of *P. L.* 1973, *c.* 363 without affording appellants an opportunity to be heard on the merits violates due process of the law. Fundamental rights cannot so lightly be discarded.

D.

A State Statute That Prohibits Persons From Bringing Solid and Liquid Waste Into a State Is in Conflict With A Federal Statute That (a) Requires Cooperation in the Establishment of Solid Waste Management Plans for Interstate Regions, and (b) Provides for the Issuance of Federal Permits to Owners and Operators of Hazardous Waste Treatment, Storage or Disposal Facilities.

The test to determine whether federal law precludes the enforcement of a state statute on Supremacy Clause grounds was expressed by the United States Supreme Court less than 6 months ago in *Jones v. Rath Packing Co.*, — *U. S.* — (1977). Speaking for seven members of the Court, Mr. Justice Marshall observed:

> "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U. S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether, under the circumstances of this particular case, the [state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U. S. 52, 67 (1940). Accord, *DeCamas v. Bica*, 424 U. S. 351, 363 (1976); *Perez v. Campbell*, 402 U. S. 637, 649 (1971); *Florida Lime & Avocado Growers, Inc. v. Paul, supra*, at 141; id., at 165 (White, J., dissenting). This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. See *DeCamas v. Bica*,

supra, at 363-365; *Swift & Co. v. Wickham,* 230 F. Supp. 398, 408 (SDNY 1964), appeal dismissed, 382 U. S. 111 (1965), aff'd 364 F. 2d 241 (CA 1 1966), cert. denied, 385 U. S. 1036 (1967)."

Appellants respectfully submit that *P. L.* 1973, *c.* 363 must fall under the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", *Hines v. Davidowitz,* 312 *U. S.* 52, 67 (1940).

The procedure for considering Supremacy Clause questions was set forth several years ago by Mr. Justice White in *Perez v. Campbell,* 402 *U. S.* 637, 644 (1971) as follows:

> "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict."

P. L. 1973, *c.* 363 has already been construed by the New Jersey Supreme Court: it prohibits any person from bringing into New Jersey any solid or liquid waste which originated or was collected outside the State, except garbage to be fed to swine, until permitted and regulated by the Commissioner of the New Jersey Department of Environmental Protection (hereinafter "Commissioner"), *Hackensack Meadowlands v. Mun. Landfill Auth.,* 68 *N. J.* 451, 468 (1975).

The Resource Conservation and Recovery Act of 1976 (hereinafter "RCRA") has not yet been construed. However, its expressed direction in relation to hazardous waste management and to interstate solid waste management is clear and unambiguous.

Hazardous Waste Management.

Not later than 18 months after the date of enactment of Sections 3003, 3004 and 3005 of RCRA, 42 *U. S. C.* §§ 6923, 6924 and 6925, the Administrator of the United States Environmental Protection Agency (hereinafter "Administrator") must promulgate regulations (a) establishing standards, applicable to transporters of hazardous waste, as may be necessary to protect human health and the environment, (b) establishing standards, applicable to owners and operators of facilities for the treatment, storage or disposal of hazardous waste as may be necessary to protect human health and the environment, and (c) requiring each person owning or operating a facility for hazardous waste treatment, storage or disposal to secure a permit for such facilities.

Upon the effective date of the aforesaid regulations, a State is prohibited, with certain exceptions not material here, from imposing any requirements less stringent than those adopted by the Administrator, 42 *U. S. C.* § 6929.

The effect of restrictive state legislation upon federal licensees was recently reviewed in *Douglas v. Seacoast Products, Inc.,* — *U. S.* — (1977). Speaking for seven members of the Court in striking down a Virginia statute which, in effect, prohibited non-residents of Virginia from catching menhaden in the Virginia portion of the Chesapeake Bay, Mr. Justice Marshall declared:

> "A number of coastal States have discriminatory fisheries laws, and with all natural resources becoming increasingly scarce and more valuable, more such restrictions would be a likely prospect, as both pro-

tective and retaliatory measures. Each State's fisherman eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishing beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent."

While a state may impose reasonable conservation regulations to protect its vital resources, such measures must be designed to effectuate a legitimate local public interest in an evenhanded manner, *Huron Cement Co. v. Detroit*, 362 *U. S., supra* at 443; *Douglas v. Seacoast Products, Inc.*, — *U. S., supra.*

The issuance of a federal license or permit implies a right to carry on the activity for which the license is issued, *Gibbons v. Ogden*, 9 *Wheat.* 1 (1824). In the context of the present litigation, the evident purpose of a federal permit to operate a hazardous waste disposal facility is to confer upon the holder the right to engage in the activity which gives the permit its real value, namely acceptance from any source of hazardous waste for storage, treatment or disposal, *Douglas v. Seacoast Products, Inc.* — *U. S., supra.*

Less than 1 year ago, the New Jersey Legislature approved a supplement to the Solid Waste Management Act (1970) governing the disposal of hazardous waste, chemical waste, bulk liquids and pesticides in the ground, *N. J. S. A.* 13:1E-38 *et seq.* Section 5 of said supplement provides, in pertinent part, as follows:

"After March 15, 1980, no solid waste facility shall accept or receive for disposal, any hazardous waste, chemical waste, bulk liquid or pesticide unless such facility has installed a system for the interception, collection and treatment of any and all leachate generated at the facility, and has obtained approval from the department [of environment protection] for the entire system."

N. J. S. A. 13:1E-42.

Not surprisingly, the Assembly Energy and Natural Resources Committee which reviewed the Act prior to its passage, discounted good-intentioned concerns about environmental degradation, saying:

". . . As originally introduced, this bill would have prohibited any solid waste facility located within . . . 2 miles of a major aquifer, from accepting such solid waste for disposal. The Senate Energy and Environment Committee changed the '2-mile' limitation to '1,000 yards.'

The Assembly Energy and Natural Resources Committee saw much merit in the sponsor's intentions, but felt that *the prohibition of disposal within 1,000 yards of a major aquifer* was too stringent and *would*, unintentionally, *prevent the location of such solid waste disposal facilities where they would present no danger to the public health and safety. . . .*"

Assembly Energy and Natural Resources Committee Statement to S. 1493 dated August 2, 1976. (Emphasis added)

The position of the Assembly Committee was adopted by the New Jersey legislature. The bill, as enacted, permits the disposal of hazardous wastes and pesticides in all sanitary landfill facilities—even those located in or near major aquifers—provided a system for the interception, collection and treatment of leachate generated at the facil-

ity has been approved by the Department of Environmental Protection and installed at the site.

Since hazardous waste can be discarded in a properly designed, operated and regulated disposal facility with no reasonable prospect of harm to public health or to environmental quality, then there is no legitimate local public interest to be effectuated by the unlimited exclusion from New Jersey of out-of-state hazardous waste. That being the case, *P. L.* 1973, *c.* 363 must fall under the Supremacy Clause for improperly limiting the full use and enjoyment of privileges inhering in a federal permit.

Interstate Solid Waste Management.

There is a second, equally compelling, Supremacy Clause problem with *P. L.* 1973, *c.* 363 which necessitates its invalidity: the statute stands as an obstacle to the establishment of solid waste management plans for interstate regions.

Pursuant to Section 4002 of RCRA, the Administrator must issue guidelines that identify areas "which have common solid waste management problems and are appropriate units for planning regional solid waste management services" within 180 days after the section's enactment, 42 *U. S. C.* § 6942(a). In the event an area identified by the Administrator is in two or more states, the respective Governors are specifically required by federal law to consult, cooperate and fix the precise boundaries of the region, 42 *U. S. C.* § 6946(c)(1). Once the boundaries have been established appropriate elected officials of general purpose units of local government must establish or designate an agency to develop a plan for the region, 42 *U. S. C.* § 6946(c)(2). It is essential to note that the public officials referred to in the federal Act have no discretion in the matter. Congress has mandated that they "shall" take the designated action.[28]

Consistent with the directive contained in 42 *U. S. C.* § 6942, on May 16, 1977, the Administrator promulgated Interim Guidelines for the Identification of Regions and Agencies for Solid Waste Management, 40 *CFR* § 255. Among the criteria listed for identifying regions are "Geographical areas which have a history of cooperating to solve problems in environmental or other related matters", 40 *CFR* § 255.10(a). Preliminary identification of regions is to be made by the Govenor or his or her representative, 40 *CFR* § 255.20, taking into consideration the published criteria for identifying regions, 40 *CFR* § 255.10, as well as the boundaries of Standard Metropolitan Statistical Areas (hereinafter "SMSA"), 40 *CFR* § 255.24(c). Once a Governor recommends the identification of an interstate region, concerned officials in the entire recommended region must be consulted, 40 *CFR* § 255.24.

Significantly, New Jersey and Pennsylvania have a history of cooperating to solve environmental and other problems. In 1966, the two States established the Delaware Valley Urban Area Compact for the coordination of regional planning in the compact area, *N. J. S. A.* 32:27-1 et seq., 73 *P. S.* & 701. Said area specifically included the counties of Burlington, Camden, Gloucester and Mercer in the State of New Jersey, and the counties of Bucks, Chester, Delaware and Montgomery and the City of Philadelphia in the Commonwealth of Pennsylvania, *N. J. S. A.* 32:27-2(b).

The Delaware Valley Regional Planning Commission, which was created by the Compact, quickly identified solid waste planning as one of its statutory responsibilities.

28. Suits to enforce any requirement which has become effective pursuant to the Resource Conservation and Recovery Act of 1976 may be brought by any person, 42 *U. S. C.* § 6972(a).

In 1969, the agency commissioned a 6 volume Regional Solid Waste Management Study for the subject area,[29] as part of its recognized planning function.

Furthermore, the Philadelphia SMSA includes, with the single exception of Mercer County, the very same counties and city participating in the Delaware Valley Urban Area Compact; and that is coterminus with one of the geographical areas involved in this litigation.

It is difficult to conceive how an interstate solid waste management plan can be developed when a participating state prohibits the entry within its borders of solid or liquid waste which originates or is collected outside the territorial limits of the state. A plan cannot be developed and implemented between unwilling participants.

In *Perez v. Campbell*, 402 *U. S., supra,* at 652, the United States Supreme Court re-emphasized the controlling principle "that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." State laws which prohibit the interstate movement of solid and liquid waste are antithetical to the accomplishment of the expressed Congressional purpose. Regional plans cannot be developed if states are free to prohibit the entry of solid waste originating in other states.

While it is true that the Committee on Interstate and Foreign Commerce, U. S. House of Representatives, in its report on H. R. 14496, commented: "At this time federal preemption of this [discarded materials] problem is undesirable, inefficient, and damaging to local initiative," p. 33, that remark was directed to the overall "discarded materials problem", and not to the relationship of specific

29. *Regional Solid Waste Management Study Design Materials,* 6 vols. (Philadelphia: University of Pennsylvania, Fels Institute of Local and State Government, 1969) (typewritten manuscripts).

state legislation with particular provision in RCRA. Congress had no intention, either express or implied, to bar concurrent state legislation in the discarded materials area, but it also did not intend to sanction state enactments which would frustrate "any part of the purpose of the federal legislation." *Colorado Comm'n v. Continental,* 372 *U. S.* 714, 724 (1963).

Eleven states have already adopted laws which by their express terms, in varying degrees, directly affect the movement of solid waste in interstate commerce, see pp. 30-31, *supra.* Even if these laws are not in actual conflict with RCRA (which appellants do not concede) they establish an unmistakable potential for conflict, *City of Burbank v. Lockheed Air Terminal,* 411 *U. S.* 624 (1973), *Jones v. Rath Packing Co.,* — *U. S., supra.* This they may not constitutionally do under the Supremacy Clause.

CONCLUSION.

The New Jersey Supreme Court has decided issues of national importance in a way not in accord with the decisions of this Court. It has also so far departed from the accepted and usual courses of judicial proceedings as to violate appellants' right to due process of the law in violation of the 5th and 14th amendments to the Constitution of the United States.

It is respectfully urged, in order of preference, and in the alternative, (1) That the judgment of the New Jersey Supreme Court be reversed and *P. L.* 1973, *c.* 363 be declared unconstitutional either on the ground that same directly burdens and discriminates against interstate commerce, or on the ground that same stands as an obstacle to the accomplishment of the full purposes and objectives of Congress in contravention of the Supremacy Clause; or (2) that the judgment of the New Jersey Supreme Court

be reversed, and the matter remanded to the trial court for a hearing on the factual issues raised by the Commerce Clause questions, provided, however, that this Court retain jurisdiction and continue the stay of judgment heretofore granted pending a final determination of the matter by this Court on its merits.

Respectfully submitted,

HERBERT F. MOORE,
ARTHUR MEISEL,
JAMIESON, MCCARDELL, MOORE,
PESKIN & SPICER,
A Professional Corporation,
Attorneys for Appellants.

SUPERIOR COURT OF NEW JERSEY.
LAW DIVISION—MERCER COUNTY.
DOCKET NO. L-15068-73 P. W.

CITY OF PHILADELPHIA, A MUNICIPAL CORPORATION OF THE COMMONWEALTH OF PENNSYLVANIA, CITY OF GLEN COVE, A MUNICIPAL CORPORATION OF THE STATE OF NEW YORK, LANDFILL & DEVELOPMENT CO., A N. J. CORPORATION, MACSANITARY LANDFILL, INC., A N. J. CORPORATION, KINSLEY'S LANDFILL, INC., A N. J. CORPORATION, AND DELORENZO-INTERSTATE WASTE REMOVAL COMPANY, A N. J. CORPORATION, JOHN P. FAZZIO, INC., T/A JOHN P. FAZZIO LANDFILL COMPANY, AND CONTINENTAL VANGUARD, A N. J. CORPORATION,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Defendants.

ORAL OPINION.

Before:

HONORABLE GEORGE Y. SCHOCH, J.S.C.

Place:

Mercer County Courthouse,
Trenton, New Jersey.

March 25, 1974.

(A1)

Appearances:

JAMIESON, WALSH, MCCARDELL, MOORE & PESKIN, by MR. HERBERT F. MOORE, and ARTHUR MEISEL, appearing on behalf of the plaintiffs, attorneys.

MR. VINCENT J. DOTOLI, appearing on behalf of defendant Fazzio, attorney.

WILLIAM F. HYLAND, Attorney General of the State of New Jersey, by MR. MARK L. FIRST, Deputy Attorney General, appearing on behalf of the defendant-State of New Jersey.

THE COURT: Well, there are three separate points raised by the motions or, I should say, by the motion and countermotion presented here. Each side makes this argument for summary judgment conceding that as to these particular issues there are no material issues of fact involved and so that the issues before the court at the moment are ripe for summary judgment.

The New Jersey Legislature passed a law, Public Law 1973, Chapter 363, which says in part, "No person shall bring into this state any solid or liquid waste which originated or was collected outside the territorial limits of the state, except garbage to be fed to swine in the State of New Jersey, until the Commissioner shall determine such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this state."

There were emergency regulations promulgated by the Commissioner, N. J. A. C. 7:1-4.1 and N. J. A. C. 7:1-4.2. The second regulation sets forth certain exceptions, descriptions of exceptions to the prohibition of solid or liquid waste, including separated waste material that is intended for re-cycling and certain other exceptions which are immaterial to the issue at hand.

Obviously the first matter that must be decide is whether the item of solid or liquid waste, we have been calling it garbage but it obviously includes more than just garbage, whether that item is a proper subject of interstate commerce. If it is not then there would be no prohibition against the state passing a law that prohibits the passage or importation of such item either through or into the state, since it would not violate the interstate commerce clause of the United States Constitution.

With reference to that point my attention has been called to two cases. One is the case of *Barnett v. A-1 Scavenger Service Co., Inc.*, a Missouri Court of Appeals case (1971) reported at 466 Southwestern 2d at 150. That case involved an interpretation of the Fair Labor Standards Act. A helper on a refuse truck who worked for an employer engaged exclusively in the collection and disposal of garbage and waste in the City of St. Louis, whether or not he was subject to the Fair Labor Standards provisions regarding minimum wage and overtime, because the employer collected waste from companies engaged in interstate commerce. At page 156 the court said, and I quote, "In the instant case it can scarcely be plausibly argued that the garbage and refuse after being collected by plaintiff entered the channels of interstate commerce, or the mere transportation of such garbage and other refuse for the purpose of disposing of it could be said to be commerce among the several states within the meaning of the Fair Labor Standards Act."

So we have the authority of that case which indicates that the transportation of trash and waste across the state line is not engaging in interstate commerce. On the other hand, there is a case of *U. S. v. Pennsylvania Refuse Removal Association*, at 242 Federal Supplement 794, U. S. District Court case for the Eastern District of Pennsyl-

vania (1965) where the court said at page 799, "Defendants argue at various points in their brief that because trash itself is by definition a worthless commodity, it cannot be the subject of 'trade or commerce' as those terms are used in the Sherman Act. That argument misses the point. Here, the relevant subject of 'trade or commerce' was not worthless debris, but the valuable service of removing and disposing of it. Since services are encompassed within the meaning of the words 'trade or commerce' as used in the Act, the defendant's position has no merit." And on appeal to the U. S. 3rd Circuit Court reported at 357 Federal 2d, 806 (1966), the 3d Circuit Court said at page 808, "From the record we are satisfied that the factual holding of the trial judge that 'the hauling and disposing of refuse was an integral part of the refuse removal business' is entirely correct. In that situation the refuse transported from Pennsylvania to New Jersey and disposed of in the latter state is a vital element of the one business operation which plainly is a proper subject of interstate commerce."

Then there is a citation of *Hoke v. U. S.*

Then we have the case of *U. S. v. Bishop Processing Company,* U. S. District Court, District of Maryland (1968) 287 Federal Supplement 624, which I think could be analogized to our case. In the Bishop case the question was whether a business or factory that polluted the air and that air pollution, malodorous pollution obviously affected business conditions and property values in the neighboring state when the wind blew the smell and pollutants across the state line. One of the questions that had to be decided was whether the Clean Air Act covered this activity, that is, whether or not movement of the air pollutants across state lines constituted interstate commerce. And the District Court in Maryland decided, at page 629, that it did, saying, "The movement of pollutants across a

state line is proper jurisdictional basis for the provisions of the Act relating to the abatement of interstate air pollution. Such movement of pollutants across state lines constitutes interstate commerce subject to the power granted the Congress by the Constitution to regulate such commerce."

From my analysis of the cases that I have just cited I think that the proper viewpoint to accept is that of the 3d Circuit that the transportation of waste across the state line is a subject of interstate commerce and, therefore, subject to the controls of Congress in accordance with the interstate commerce laws. However, that is not dispositive of the problem. The plaintiff suggested the second point that the Federal Government has pre-empted this field, and when I say this field I mean the field of prohibition of interstate movement of solid waste for either treatment or disposal.

I prefer to decide the problem on the basis of discrimination rather than on the theory of pre-emption because I think the issue is more clearly defined when we consider discrimination. I have already read certain portions of the federal code. I will refer to them again. 42 U. S. C. A. 3254. Let me read this in full. "The secretary shall encourage cooperative activities by the states and local governments in connection with solid waste disposal programs; encourage, where practicable, interstate, interlocal and regional planning for, and the conduct of, interstate, interlocal and regional solid-waste disposal programs; and encourage the enactment of improved and, so far as practicable, uniform state and local laws governing solid waste disposal."

In Section 3251 there are five parts to subsection (b) setting forth the purposes of this particular law, all of which talk about assistance, technical advice, training

grants, et cetera. None of which seems to me indicate the type of pre-emption that I feel would be required in order to find the Federal Government has pre-empted this field in the fashion that the plaintiffs suggest and to arrive at the decision the plaintiffs suggest.

So we come to the question of whether or not this statute passed by the Legislature of New Jersey which, as I have already indicated, I find involves material which is the subject of interstate commerce, whether the statute discriminates against interstate commerce to the extent that it should be declared unconstitutional. I immediately concede that I am aware of the cases which hold that there is a strong presumption that the statute is constitutional and the legislative act will not be declared void unless its repugnancy to the Constitution is clear beyond a reasonable doubt. Further, to declare a statute unconstitutional is a judicial power to be delicately exercised, quoting from *Harvey v. Essex County Board of Freeholders*, 30 N. J. 381. The Court in the case of *Supermarket General v. Sills*, 93 N. J. Superior, 326 (Chancery Div. 1966) cites a quotation from the U. S. Supreme Court case of *Head v. New Mexico Board of Examiners* at page 345. The New Jersey Court says, "A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way. State regulation based on the police power which does not discriminate against interstate commerce or operate to disrupt its required uniformity may constitutionally stand."

As Judge Schreiber said in the case of *Hackensack Meadows Development v. Municipal Sanitary Landfill Authority*, a Chancery Division slip opinion dated February 13, 1974, page 12 of that slip opinion, "State regulations and laws based on the exercise of the police power may only stand if they do not discriminate against interstate commerce."

I am aware of the long line of cases that deal with the transportation of deleterious substances. They are listed in *Baldwin v. Seelig*, 294 U. S. 511 (1934), opinion of Mr. Justice Cardozo, at page 525, 7 Lawyers Ed., 1039, which recites some of the cases which have upheld the statutes regulating the importation of unhealthy cattle, decayed foods. Mr. Justice Cardozo says, "Things such as these are not proper subjects of commerce (and notes) there is no unreasonable interference when they are inspected and excluded."

I think the situation is different in this case before me and I see a relationship between the natural gas cases and this case. Some may say it's a strained reason but the natural gas cases that I refer to are *Pennsylvania v. West Virginia*, 262 U. S. 553, and *West v. Kansas Natural Gas Company*, 221 U. S. 229. Each of those cases, the so-called home state attempted to prevent the exportation of one of its natural resources and the statutes were struck down as unconstitutional in derogation of the free flow of commerce, that it is Congress' prerogative to control and not the state.

If we consider, as I do, that the purpose of the statute in question here is to conserve natural resources of the state, that by restricting the amount of solid waste that is presented to the various disposal companies, the natural resources, the land, the availability of the land will be prolonged or extended or used less quickly. I don't see any difference between a state being prevented from prohibiting exportation of natural gas than the state being prevented from prohibiting the importation of something that will in effect use one of the state's natural resources.

Therefore, I find that the statute in question here is attempting to control material that is properly the subject of interstate commerce, that the method of attempting is discriminatory and, therefore, unconstitutional.

You will prepare an order, Mr. Moore?

MR. MOORE: Yes, sir.

(End)

COURT REPORTERS CERTIFICATION.

I, ANTHONY DI STEFANO, one of the Official Court Reporters of the Superior and County Courts of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes taken by me in the above entitled matter.

ANTHONY DI STEFANO
Anthony Di Stefano

Dated: March 28, 1974.

[127 *N. J. Super.* 160, 316 A. 2d 711 (Ch. 1974)]

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HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION AND STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, PLAINTIFFS, *v.* MUNICIPAL SANITARY LANDFILL AUTHORITY, A JOINT VENTURE OF WILLIAM A. KEEGAN, INC., RECLAMATION AND IMPROVEMENT CO., PETER ROSELLE & SONS, INC., AND DELAWARE SANITARY CO., DEFENDANTS, AND CITY OF YONKERS, NEW YORK, DEFENDANT-INTERVENOR.

Superior Court of New Jersey
Chancery Division
Decided February 13, 1974.

• • •

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Mr. Mark L. First, Deputy Attorney General, for plaintiffs (*Mr. George F. Kugler, Jr.*, Attorney General of New Jersey, attorney).

Mr. David Samson for defendants (*Messrs. Lieb, Wolff & Samson*, attorneys).

Mr. Eugene J. Fox, of the New York Bar, Corp. Counsel for City of Yonkers, pro hac vice for defendant-intervenor (*Messrs. Schapira, Steiner & Walder*, attorneys).

SCHREIBER, J. S. C. The Hackensack Meadowlands Development Commission (HMDC) and the State of New Jersey, Department of Environmental Protection (DEP),

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seek to enjoin the Municipal Sanitary Landfill Authority (MSLA) from accepting for disposal in its landfill site located within
the Hackensack Meadowlands District any solid wastes originating from or collected outside the territorial limits of New Jersey. Both HMDC and DEP had adopted regulations, effective September 1, 1973 and August 31, 1973, respectively, which prohibited such disposal.

An *ad interim* restraint, consented to by defendant, had been entered pending determination of the request for a permanent injunction. On the return date of the order to show cause defendants answered by challenging the constitutionality of the regulations and the Waste Control Act, *N. J. S. A.* 13:1I-1 *et seq.* The hearing was adjourned to allow plaintiffs time to respond to the challenges. In the meantime the City of Yonkers, New York, whose refuse was being deposited on the MSLA site, moved for and was granted leave to intervene as a party defendant. No testimony was taken at the hearing. The parties relied on affidavits and the transcript of proceedings taken before the Hackensack Meadowlands Commission on June 18, 1973.

MSLA has made a three-fold attack. It contends that (1) the Waste Control Act, regulation *N. J. A. C.* 7:26-1.5 promulgated thereunder, and certain regulations of HMDC, namely, *N. J. A. C.* 19:7-1.1(g) and (h), are invalid, arbitrary and unreasonable; (2) the procedure followed by DEP in promulgating its rule, *N. J. A. C.* 7:26-1.5, violated due process of law, and (3) all the above designated regulations and the Waste Control Act must fall because they violate Article 1, Section 8, paragraph 3 (the Commerce Clause) and Article 4, Section 2 (the Privileges and Immunities Clause), of the U. S. Constitution.

I

The Waste Control Act, *N. J. S. A.* 13:1I-1 to 8, recites that the Legislature found that the disposal of wastes generated or collected outside the State poses a threat to the quality of New Jersey's environment and that the Commissioner of Environmental Protection was empowered to create

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regulations prohibiting the "landfill of solid waste" and the "disposal of liquid wastes" within the State which originated or were collected outside New Jersey. The Commissioner adopted Regulation *N. J. A. C.* 7:26-1.5, effective August 31, 1973, which reads as follows:

> Out of State waste
>
> (a) No person engaged in the collection of solid or liquid wastes shall dispose of any solid or liquid wastes which originated or were collected outside the territorial limits of this State in sanitary landfills in the Hackensack Meadowlands District.
>
> (b) No person owning or operating a sanitary landfill within the Hackensack Meadowlands District shall accept for disposal in such sanitary landfill any solid or liquid wastes which originated or were collected outside the territorial limits of this State.

Defendant contends that there is no basis for the Legislature's findings, that the regulation is invalid in the absence of a showing of a causal relationship between banning out-of-state garbage in New Jersey and a threat to its environment, and that the regulation is overly broad by banning all wastes. The statute and the administrative regulations are presumptively valid. *Harvey v. Essex County Board*

of Freeholders, 30 *N. J.* 381 (1959); *Burton v. Sills,* 53 *N. J.* 86 (1968); *State of Profaci,* 56 *N. J.* 346 (1970). Since one can reasonably and readily conceive of facts which would support the Legislature's findings and the Commissioner's regulations, the onus is on defendant to establish that the Legislature's and Commissioner's actions are arbitrary. *Consolidation Coal Co. v. Kandle,* 105 *N. J. Super.* 104 (App. Div. 1969), aff'd 54 *N. J.* 11 (1969); *Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Comm'n,* 120 *N. J. Super.* 118 (App. Div. 1972); *Borden's Farm Products Co., Inc. v. Baldwin,* 293 *U. S.* 194, 55 S. Ct. 187, 79 L. Ed. 281 (1934). Defendant's proof consisted of an affidavit of an engineer, Dennis L. Backus, and the transcript of proceedings before the Hackensack Meadowlands Commission held on June 18, 1973 with respect to its proposed regulations. The affidavit asserts that quantities of solid

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wastes are used for construction purposes and that therefore a complete ban on disposal of out-of-state solid wastes is inappropriate. This conclusion does not necessarily follow because no reference is made to the amount of New Jersey refuse which is being used for landfill purposes, the limited amount of area available, and the environmental and public health impacts involved. Further, an affidavit of Lino Pereira, the Principal Environmental Engineer of DEP, asserts that sanitary landfills "present a pollution danger because they do not conserve or recover resources but bury them, and because they severely limit the future use of the land on which they are located." Additionally, he avers that sanitary landfills present a unique fire problem. An affidavit of Bernhard V. Lind, Acting Chief of the Bureau of Solid Waste Management in the DEP, asserts that of the 55,000 tons per week of solid waste being disposed of in the Hackensack Meadowlands District, 10,000 tons originated outside New Jersey and there was an acute shortage of remaining landfill life located there. In view of all the foregoing, it is obvious that MSLA has not met its burden.

The same type of attack has been made upon regulations *N. J. A. C.* 19:7-1.1(g) and (h) of the HMDC. These regulations read as follows:

> 19:7-1.1(g). No solid waste originating or collected outside of the territorial jurisdiction of New Jersey shall be disposed of or treated within the Hackensack Meadowlands District. No sanitary landfill operator shall accept for disposal, at a sanitary landfill within the Hackensack Meadowlands District, any solid waste originating or collected outside of the territorial limits of New Jersey.
>
> 19:7-1.1(h). All operators of sanitary landfills within the Hackensack Meadowlands District shall submit to the Commission, together with their applications, as provided in Sections 3 and 4 of this subchapter, a certification stating that no solid waste originating or collected outside of the territorial limits of New Jersey will be accepted for disposal or treatment.

Defendant has made no showing that there was no basis for these regulations. The affidavits of William D. McDowell, Executive Director of HMDC, and George D. Cascino, its

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Chief Engineer, disclosed that three surveys had been made to determine the volume and origin of solid waste disposed of in landfills in the Hackensack Meadowlands District.

The first disclosed that in 1968 some 30,000 tons were entering the District each week, of which 4,000 tons originated outside New Jersey. HMDC study in 1971 revealed that the weekly tonnage was 42,000, of which 5,000 emanated from outside the State. In April 1973 HMDC updated its study. At that time weekly tonnage had increased to 55,000, of which 10,000 came from sources outside of New Jersey. The Commission concluded that the sites had only three years of life remaining and that banning of out-of-state garbage would extend the landfill life some six months.

Under the Hackensack Meadowlands Development Act the Commission must provide disposal facilities for the New Jersey municipalities (totalling 118, according to plaintiffs) which had been utilizing the District. *N. J. S. A.* 13:17-10(a), (b) and (e). The affidavits point out that the Commission needs as much time as possible to develop a viable alternate method of disposal. One cannot reasonably contend that promulgation of the regulations under the totality of these facts and circumstances was arbitrary.

Defendant also argues that the HMDC regulations contravene *N. J. S. A.* 13:17-6(w) and 13:17-10(b) and (e) by failing to provide for disposal facilities for waste equal to levels at the time the statute was passed, which levels included out-of-state waste. *N. J. S. A.* 13:17-6(w) authorizes HMDC "to provide solid waste disposal facilities for the treatment and disposal of solid waste, as hereinafter provided." *N. J. S. A.* 13:17-10 reads:

> (a) Within 6 months of the effective date of this act the commission shall undertake and complete a survey of the district to determine the total amount of solid waste treated and disposed on a daily basis in the district as of the effective date of this act by persons *in this State*.

> (b) The commission is hereby authorized, empowered and directed to guarantee that solid waste disposal facilities sufficient to treat and

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> dispose of the total amount of solid waste determined by its survey shall be available or be provided by the commission.
>
> • • •
>
> (e) The commission, in its discretion, may provide solid waste disposal facilities sufficient to treat and dispose of more than the total amount of solid waste determined by its survey, and may make such facilities available to persons other than those treating and disposing of solid waste in the district as of the effective date of this act. [Emphasis added]

Defendant reads these three sections together as guaranteeing continued use to *all* persons utilizing the disposal facilities in the Meadowlands at the time the act was passed. To interpret the statute in that way, however, one must delete the last three words in subsection (a). The inclusion of those words, "in this State," demonstrates that the Legislature was concerned about waste collected in New Jersey. If it intended to include all waste disposed of in the Meadowlands no matter where its origin, the phrase, "in this State" would not have been inserted, since, obviously, garbage dumped in the Meadowlands is dumped in this State. One must assume in interpreting a statute that the legislators would not insert a redundant or meaningless phrase. The only significance in these words is that the Legislature was interested in providing for disposal of New Jersey garbage—therefore, the remaining subsections, when referring to the "total amount of solid waste determined by

its [the Commission's] survey," are concerned with the total amount of garbage disposed of in the Meadowlands by *persons in this State, i.e.*, the total amount of New Jersey waste dumped in the Meadowlands. This is the only sensible interpretation. The concern of the New Jersey Legislature was to safeguard the area for New Jersey operations—not New York, Pennsylvania, or other jurisdictions. As Justice Jacobs wrote in *J. C. Chap. Prop. Owners', etc., Ass'n v. City Council*, 55 N. J. 86 (1969):

> When all is said and done, the matter of statutory construction here will not justly turn on literalisms, technisms or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation. [at 100]

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To the same effect: *State v. New Jersey National Bank and Trust Co.*, 62 *N. J.* 50 (1972). Defendant's contention that the regulations contravene the enabling statute is unsound for the statute mandates only that the Commission guarantee disposal facilities for New Jersey communities utilizing the landfill sites as of the effective date of the act.

II

Defendant attacks the procedure followed by the DEP in adopting *N. J. A. C.* 7:26-1.5, claiming that the failure to hold a hearing prior to adoption of the rule denied defendants due process. This contention has no merit. Plaintiff DEP caused the proposed regulation to be published in the *New Jersey Register* on July 5, 1973, with the statement that "interested persons may present statements or arguments in writing relevant to the proposed action on or before August 3, 1973." 5 *N. J. R.* 220(c). This notice was consistent with the Administrative Procedure Act, *N. J. S. A.* 52:14B-1, *et seq.*, and complied with *N. J. S. A.* 52:14B-4(a)(2), affording any interested person a reasonable opportunity to be heard. Defendant concedes that the act does not require a formal hearing and that it did not submit a statement or request a hearing. The uncontroverted statement in the affidavit of Mr. Lind is that no written statement or argument was received by DEP from any interested person. Under these circumstances there was no constitutional or statutory requirement that a hearing be held prior to the promulgation of the regulations. *Motyka v. McCorkle*, 58 N. J. 165 (1971).

III

There remains defendant's constitutional challenges. *i.e.*, that the DEP and HMDC regulations set forth above violate Article I, Section 8, paragraph 3 (Commerce Clause) and Article IV, Section 2 (Privileges and Immunities Clauses) of the U. S. Constitution. (Defendant has not

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argued the Waste Control Act is unconstitutional). Defendant has not vigorously advanced its argument with respect to Article IV, Section 2, and it is not necessary to deal with that contention in depth. Suffice it to say there are serious infirmities in that position, such as the fact that it is not applicable to corporations and that it only applies where there is no substantial reason for the discrimination. *Paul v. Virginia*, 8 Wall. 168, 75 *U. S.* 168, 19 L. Ed. 357 (1868); *Hemphill v. Orloff*, 277 *U. S.* 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928); *Toomer v. Witsell*, 334 *U. S.* 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).

Article I, Section 8, provides that "Congress shall have power • • • to regulate commerce • • • among the several States • • •." DEP and HMDC contend that garbage is

not a legitimate subject of trade or commerce and therefore not within the purview of the Commerce Clause. They rely upon a number of cases which recognize the power of a state to forbid the sale or importation of impure foods or such articles as would spread disease and pestilence and would be immediate causes of destruction of or injury to human health and life. A state's prohibition of the interstate transportation of diseased animals has been held not to contravene the Commerce Clause. *Clason v. Indiana,* 306 *U. S.* 439, 59 S. Ct. 609, 83 L. Ed. 858 (1939). Similarly, statutes forbidding the importation and sale of adulterated or injurious food or drugs have withstood constitutional attacks. *Crossman v. Lurman,* 192 *U. S.* 189, 24 S. Ct. 234, 48 L. Ed. 401 (1904); *Price v. Illinois,* 238 *U. S.* 446, 35 S. Ct. 892, 59 L. Ed. 1400 (1915). In *Sligh v. Kirkwood,* 237 *U. S.* 52, 35 S. Ct. 501, 59 L. Ed. 835 (1915), a Florida statute prohibiting the exportation of fruits which were unfit for human consumption was held valid. All these cases classified the matter (diseased animals, adulterated food, fruit unfit for human consumption) as nonmerchantable. In all the food and drug cases the articles were banned to protect the public from mistaking them for pure and wholesome foods and to prevent the spread of disease. The articles in-

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volved had no useful purpose and were *per se* dangerous to health. On the other hand, refuse may be utilized for construction, landfill, recycling of paper, bottles and metal, and production of electricity. In passing, it might be noted that some successful incinerator systems which create waste heat for power generation exist in Germany, the Netherlands, France and Switzerland. In the instant situation there is no prohibition against the transportation of out-of-state garbage in or through New Jersey or the disposal of such refuse in New Jersey landfill sites located in places other than the Hackensack Meadowlands Districts.[1] It is not the danger to public health due to transportation of garbage in New Jersey or location of the garbage in a licensed landfill site in the State which is the evil that the Waste Control Act and the regulations are directed at. The purpose is conservation of the land used for disposal sites in the Hackensack Meadowlands District so that their life expectancy will be extended from 3 to 3½ years. In any event, the regulations in question here which are directed to the restricted use of sites for New Jersey garbage cannot be sanctioned on the concept that garbage is not a legitimate subject of interstate commerce.

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It is well established that a state may, in the exercise of its police power, enact legislation, even though it may affect interstate commerce, provided that the Federal Government has not preempted the field. *Gibbons v. Ogden,* 9 Wheat 1, 22 *U. S.* 1, 6 L. Ed. 23 (1824); *Missouri, Kansas & Texas Railway v. Haber,* 169 *U. S.* 613, 18 S. Ct. 488, 42 L. Ed. 878 (1898); *Sligh v. Kirkwood, supra; Yellow Cab*

1. *L.* 1973, *c.* 363, enacted on January 2, 1974, authorizes the Commissoiner of the Department of Environmental Protection to determine when any solid or liquid waste which originated or was collected outside New Jersey may not be brought into the State. He has enacted regulations to that effect. *N. J. A. C.* 7:1-4.2. The effect of that statute and regulations is not before the court, although they may render this decision moot. It is interesting to note that the regulations adopted by the Commissioner except from the prohibition separated waste material intended for recycling or reclamation, municipal solid waste to be processed into reusable secondary materials, including fuel and heat, and "hazardous waste" which is to be treated in a solid waste disposal facility. The new law and regulations are concerned with the public health as well as environmental impact. The Commissioner's definition of "hazardous waste" would appear to fall into category of nonmerchantable material not subject to the Commerce Clause. *N. J. A. C.* 7:1-4.1.

Co. of Camden v. State, 126 *N. J. Super.* 81 (App. Div. 1973), certif. den. 64 *N. J.* 498 (1974).

The Federal Government has not adopted legislation dealing with the use of waste landfill sites. Further, the regulations and statute in question are clearly within the authority of the State's police power to conserve its landfill sites. It as been recognized that the dumping of garbage in a landfill is an unattractive and undesirable use of land and that it creates potential health and fire hazards. In *Shaw v. Byram Tp.*, 86 *N. J. Super.* 598 (App. Div. 1965), Judge (now Justice) Sullivan wrote:

> • • • Garbage or refuse is unsightly, smelly, attracts flies and rodents, and is a potential fire hazard. It is a prime source of disease and contamination. It has been called a necessary evil because it is a by-product of a civilized society. Ordinarily, some provision is made for its collection and disposal by the local government. However, problems of public health and welfare are involved, and no matter how carefully regulated, garbage dumps present some hazard to a community, the degree of hazard being directly related to the amount of garbage dumped. [at 602]

In *Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Comm'n*, Judge Lynch approved the Commission's finding that:

> Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property*. Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites. [120 *N. J. Super.* at 122]

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However, state regulations and laws based on the exercise of the police power may only stand if they do not discriminate against interstate commerce. In other words, the exercise of the police power may not be predicated on a method directed against interstate commerce. Plaintiffs concede that this is so. This nondiscrimination principle has been expounded in several United States Supreme Court decisions. In *Huron Portland Cement Co. v. Detroit*, 362 *U. S.* 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960), the City of Detroit had passed an ordinance which limited the permissible amount and density of smoke emissions from the boiler stacks of vessels while docked in the city. Huron Portland Cement Co., a Michigan corporation whose ships travelled among several states via the Great Lakes, challenged the code as an unlawful interference with interstate commerce. The court held that the ordinance was a valid exercise of the state's police power since it applied generally to *all* ships and did not discriminate in favor of local industry. Mr. Justice Stewart wrote:

> • • • State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand. Hennington v. Georgia, 163 U. S. 299, 16 S. Ct. 1086, 41 L. Ed. 166; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 19 S. Ct. 465, 43 L. Ed. 702; Pennsylvania Gas Co. v. Public Service Com., 252 U. S. 23, 40 S. Ct. 279, 64 L. Ed. 434 [PUR 1920E 18]; Milk Control Bd. v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752; Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28, 68 S. Ct. 358, 92 L. Ed. 455.
>
> • • •

> It has not been suggested that the local ordinance, applicable alike to "any person, firm or corporation" within the city, discriminates against interstate commerce as such. It is a regulation of general application designed to better the health and welfare of the community. * * * We conclude that no impermissible burden on commerce has been shown. [at 448, 80 S. Ct. at 818].

In *S. C. Hwy. Dept. v. Barnwell Bros. Inc.*, 303 *U.S.* 177 58 S. Ct. 510, 82 L. Ed. 1522 (1938), Mr. Justice Stone, in upholding a state law which limited the width and load of trucks on state highways, wrote:

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> The commerce clause by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. Robbins v. Shelby County Taxing District, 120 U. S. 489, 498, 30 L. Ed. 1189; Caldwell v. North Carolina, 187 U. S. 622, 626, 47 L. Ed. 336. It was to end these practices that the commerce clause was adopted.

In *Guy v. Baltimore*, 100 *U. S.* 434, 25 L. Ed. 743 (1879), a Maryland statute authorized Baltimore to collect wharfage fees from all vessels which docked in city wharves, provided that the material to be loaded or unloaded was not produced in Maryland. The city adopted an ordinance accordingly. The court commented:

> In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles, of that kind, that may be produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States. [at 443]

The court invalidated the ordinance on the ground that:

> * * * no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States more onerous public burdens or taxes than it imposes upon the like products of its own territory. [at 439]

The court also indicated that the wharves were property held for public use by the municipality, which could not "be permitted by discrimination" to impede commercial intercourse. That property held for public use may not be limited on a discriminatory basis has peculiar pertinence here. The New Jersey Legislature has deemed it appropriate to classify op-

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erations of garbage landfill sites as public utilities. *N. J. S. A.* 48:2-13. As such they would appear to be affected with a public interest as much as a municipally owned wharf. It might be noted that the State has expressly pro-

hibited a public utility from directly or indirectly making or giving "any undue or unreasonable preference or advantage to any person, locality or particular description of traffic, or subject any particular person, locality or particular description of traffic to any prejudice or disadvantage." *N. J. S. A.* 48:3-4.

DEP and HMDC rationalize that discrimination is absent because the regulations do not prefer New Jersey over out-of-state landfill operators or garbage haulers. The difficulty with that rationale is that it is the discrimination based on the origin of the refuse, not the residence of the owner or carrier, which is invidious. Transportation of the refuse, whether carried by New Jerseyans or nonresidents, in interstate commerce is directly affected by the ban.

Although the State's objective in attempting to conserve a local natural resource for local needs is a proper police power purpose, that cannot be accomplished by discrimination based on the source of the refuse. In *Pennsylvania v. West Virginia*, 262 *U. S.* 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923), a West Virginia statute restricted the exportation of natural gas to ensure a sufficient supply for its own citizens. Although the Supreme Court recognized (at 598, 43 S. Ct. at 665) that "the gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of people of the state," the statute had to fall because it interfered with interstate commerce.

Oklahoma enacted a law which prevented a pipeline company from transporting natural gas outside the state. The purpose of the law was to conserve natural gas in the Oklahoma fields for consumption in the state. In declaring the statute violative of the Commerce Clause, the U. S. Supreme

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Court, in *West v. Kansas Natural Gas Co.*, 221 *U. S.* 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911), commented:

> • • • The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequence does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce, instead of the States, a new power appears and a new welfare,—a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United

States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court. [at 255, 31 S. Ct. at 571]

The Commissioner of Environmental Protection and the Hackensack Meadowlands Development Commission adopted the regulations in question to expand the life of the landfill sites for garbage collection in the Hackensack Meadowlands District from 3 to 3½ years. To attempt to accomplish that end by discriminating against sources of refuse solely because they originate or are collected outside the State under the circumstances here contravenes Article I, Section 8, Clause 3 of the U. S. Constitution. The regulations are invalid.

[68 *N. J.* 451, 348 A. 2d 505 (1975)]

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HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION and State of New Jersey Department of Environmental Protection, Plaintiffs-Appellants,

v.

MUNICIPAL SANITARY LANDFILL AUTHORITY et al., Defendants-Respondents,

and

City of Yonkers, New York
Defendant-Intervenor-Respondent
CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

John P. Fazzio Landfill, Inc., t/a John P. Fazzio Landfill Co., et al., Plaintiffs-Intervenors-Respondents,

v.

STATE of New Jersey et al., Defendants-Appellants.

Supreme Court of New Jersey.
Argued Dec. 2, 1974.
Decided Nov. 18, 1975.

• • •

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Mr. Stephen Skillman, Assistant Attorney General, argued the cause for defendants-appellants (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Skillman*, of counsel; *Mr. Mark L. First*, Deputy Attorney General, on the brief).

Mr. Herbert F. Moore argued the cause for plaintiffs-respondents, City of Philadelphia, etc., et al (*Messrs. Jamieson, Walsh, McCardell, Moore and Peskin*, attorneys; *Mr. Moore*, of counsel; *Mr. Arthur Meisel*, on the brief).

Mr. Vincent J. Dotoli argued the cause for plaintiffs-intervenors-respondents, John P. Fazzio, Inc., t/a John P. Fazzio Landfill Co., et al.

Mr. David Samson argued the cause for defendants-respondents, Municipal Sanitary Landfill Authority, etc. (*Messrs. Leib, Wolff and Samson*, attorneys).

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for plaintiffs-appellants (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Skillman*, of counsel; *Mr. Mark L. First*, Deputy Attorney General, on the brief).

The opinion of the Court was delivered by

MOUNTAIN, J.

These proceedings involve the joint review of two separate cases. In one case the judgment was entered pursuant to an opinion rendered in *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*, 127 N. J. Super. 160, 316 A. 2d 711 (Ch. Div. 1974). In the other, judgment was entered following the rendition of an oral opinion in a suit brought by the City of Philadelphia, together with the owners of several landfill operations in South Jersey, against the State of New Jersey and its Department of Environmental Protection (DEP). The [456] cumulative effect of these two judgments was to render unconstitutional certain sections of the Waste Control Act, N. J. S. A. 13:11-1 *et seq.*, together with regulations promulgated by DEP and by the Hackensack Meadowlands Development Commission (HMDC). The measures declared unconstitutional had as their purpose the exclusion from this State of solid waste originating elsewhere. In each suit the trial court found that the laws and regulations under review violated the Commerce Clause, Article 1, § 8, clause 3, of the United States Constitution.

I

The comprehensive authority and responsibility delegated by the Legislature to the HMDC in the Hackensack Meadowlands Reclamation and Development Act, N. J. S. A. 13:17-1 *et seq.*, includes the power to provide facilities for the treatment and disposal of solid waste. N. J. S. A. 13:17-6(w), 13:17-10. The Waste Control Act, N. J. S. A. 13:1I-1 et seq., as originally enacted, contained a legislative finding "that the quality of New Jersey's environment be being threatened by the treatment and disposal of wastes generated or collected outside the State . . ." N. J. S. A. 13:1I-2. By amendments to this act that became effective early in 1974, the Legislature further found that the whole problem of solid waste disposal was growing increasingly acute and that it continued to be seriously exacerbated by the importation of waste from without the State; it determined to and did forbid that any further such waste be brought into the State.[1] The Waste Control Act also au-

1. The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and dispersal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State and that the public, health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited. [N. J. S. A. 13:1I-9]

No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of

thorized and directed [457] the DEP to promulgate rules and regulations "prohibiting . . . the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State." N. J. S. A. 13:1I-4. Both HMDC and DEP promulgated regulations responsive to these legislative enactments, all looking to bar the importation of solid and liquid waste from outside the State.[2]

1. (Cont'd.)
the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [Commissioner of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act." P. L. 1973, c. 39. [N. J. S. A. 13:1I-10]

2. The pertinent portions of the HMDC regulations, which became effective September 1, 1973, reads as follows:

> (g) No solid waste originating or collected outside of the territorial jurisdiction of New Jersey shall be disposed of or treated within the Hackensack Meadowlands District. No sanitary landfill operator shall accept for disposal, at a sanitary landfill within the Hackensack Meadowlands District, any solid waste originating or collected outside of the territorial limits of New Jersey.
>
> (h) All operators of sanitary landfills within the Hackensack Meadowlands District shall submit to the Commission [Hackensack Meadowlands Development Commission] . . . a certification stating that no solid waste originating or collected outside of the territorial limits of New Jersey will be accepted for disposal or treatment. [N. J. A. C. 19:7-1.1]

The regulation of the DEP in its present form became effective February 1, 1974 and reads as follows:

> (a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:
>
> 1. Garbage to be fed to swine in the State of New Jersey;
>
> 2. Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials

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In order to enforce these statutes and rules HMDC and DEP filed a complaint seeking permanently to enjoin Municipal Sanitary Landfill Authority (hereinafter MSLA)[3] from accepting for disposal at its landfill sites any solid waste originating or collected outside of the State's territorial borders.[4] At the same time, with the consent of the defendants, an order to show cause issued with temporary restraints prohibiting MSLA from accepting for disposal out-of-state waste. On the return day of the order to show cause, defendants answered, challenging the constitutionality of both the DEP and HMDC regulations as well as the statutes authorizing their promulgation. Thereafter the City of Yonkers, New York, was granted leave to intervene as a party defendant, as it was

2. (Cont'd.)
and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

> 3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and
>
> 4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State. [N. J. A. C. 7:1-4.2]

An earlier DEP regulation was before the trial court in the *Hackensack Meadowlands* case and is set forth in the court's opinion. 127 N. J. Super. at 164, 316 A. 2d 711. It was expressly repealed at the same time that it was superseded by the regulation last above quoted. N. J. A. C. 7:26-1.5.

3. Municipal Sanitary Landfill Authority is a joint venture wholly owned and operated by other named defendants. Its landfill operations are located in the Town of Kearny, within the Hackensack Meadowlands District.

4. Plaintiffs also sought statutory penalties pursuant to N. J. S. A. 13:11-5.

then using an MSLA site to dispose of its municipal refuse. No testimony was taken; the parties relied on affidavits and the transcript of previous [459] proceedings before the Hackensack Meadowlands Commission. In February, 1974, the trial judge filed a written opinion declaring the DEP and HMDC regulations to be in contravention of the Commerce Clause of the United States Constitution and therefore invalid. *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority, supra,* 127 N. J. Super. 160, 316 A. 2d 711 (Ch. Div. 1974). Judgment was temporarily stayed and on March 26, the Appellate Division granted plaintiffs' motion for a further stay pending determination of the appeal. Upon application by plaintiffs, this Court granted certification while the appeal was pending unheard in the Appellate Division, R. 2:12-2, 66 N. J. 337 (1974).

In January, 1974, in a separate plenary suit, the City of Philadelphia, together with other plaintiffs mentioned above, filed a complaint seeking a declaration that the Waste Control Act, as well as the regulations promulgated pursuant thereto, violated the Constitutions of both the United States and the State of New Jersey, and further seeking temporary and permanent injunctive relief restraining DEP from enforcing the statutory provisions and from adopting or enforcing regulations intended to be in furtherance of the statutory purpose. On March 25, 1974 the trial judge (not the judge who had heard the *Hackensack Meadowlands* case), on cross-motions for summary judgment, rendered an oral opinion declaring that N. J. S. A. 13:1I-9 and 10 effected an improper discrimination against interstate commerce and were hence unconstitutional. Following the filing of a notice of appeal to the Appellate Division, N. J. 102, 335 A. 2d 55 (1974), and the two actions were brought on for argument and disposition before us at the same time.

We thus face an issue of major public importance, namely, whether the regulations and statutes under review, designed to meet a pressing emergency in the life of the State, are of [460] such a nature as to violate the Commerce Clause, Article I, § 8, clause 3, of the United States Constitution.[5]

II

The Court is acutely aware of the solid waste disposal problem which now exists in the State of New Jersey. Very recently we recognized that it had reached "crisis proportions" due to the increasing scarcity of sites for dumping and landfill. *Southern Ocean Landfill, Inc. v. Mayor and Council of the Township of Ocean,* 64 N. J. 190, 193, 314 A. 2d 65 (1974). The facts presented in the two cases now before this Court, together with the legislative concern with this problem to which we have alluded above and of which more will be said below, serve to reinforce very strongly our consciousness of this extremely serious situation.

The materials constituting the records on these appeals reveal that since the effective date of the creation of HMDC, July 1, 1968, three surveys have been conducted to determine the volume and origin of the solid waste disposed of in the landfills located within HMD. The first survey, mandated by N. J. S. A. 13:17-10(a), found that in 1968 approximately 30,000 tons of solid waste entered HMD each week, of which about 4,000 tons originated outside of New Jersey. The second survey, con-

5. We do not reach the question of the validity of the regulations and statutes when measured against the Privileges and Immunities Clause, Article IV, § 2 of the United States Constitution. The argument for invalidity was found to be totally without merit in the HMDC case, 127 N. J. Super. at 168-69, 316 A. 2d 711, and has not been briefed before us by the parties in either of the two suits.

ducted in 1971, indicated that the total volume of solid waste disposed of in the District had risen to 42,000 tons per week, 5,000 tons of which originated outside of the State. The latest survey, conducted in 1973, revealed further increases to total weekly deposits of 55,000 tons of [461] solid waste, of which about 10,000 tons came from out of state.[6]

On the basis of the 1973 survey, it was estimated by HMDC that the existing landfill sites within HMD had a useful life of about three years, but that a ban on out-of-state refuse would extend their availability by approximately six months. Since the adoption of the ban on out-of-state dumping, the HMDC revised its estimates of the remaining life of the landfills within the HMD. It was calculated that as of January 1, 1974, sanitary landfills within that area had a total life expectancy of about 38 months if the ban were to be continued, but an availability of only 26 months if the ban were to be lifted. Furthermore, there is little chance of reducing the volume of garbage being dumped in the HMD which originates within the State, for the reason, among others, that the Commission has become obligated by statute, N. J. S. A. 13:17-10, to provide solid waste disposal facilities for over 100 New Jersey municipalities.

State-wide, the picture appears much the same. It was estimated that in 1971 over 40,000 tons of solid waste originating out of state was being buried each week in the 340 sanitary landfills then existing within the State. DEP estimated that in that year 1.5 million tons of solid waste originating outside of the State was buried in New Jersey. DEP has also recently computed the total life of the existing sanitary landfill facilities to be about three years in northern New Jersey and approximately ten years in the

6. It was determined that about 6,700 of the 10,000 tons were being disposed of in the three MSLA sites.

southern part of the State. It has also been estimated that a state-wide prohibition on solid waste originating elsewhere would lengthen the state-wide landfill life by approximately 8%, with the increase in some specific landfills being as high as 50 to 100%.

Compounding the shortage problem are other extremely important environmental considerations. Many existing land- [462] fills within the State are located within ecologically sensitive areas, such as floodplains, wetlands, or on State-owned public trust tidelands. The operation of landfills now located in these areas may have to be limited or discontinued. An example of this is the action taken by HMDC in preserving some 1,500 acres of virgin wetlands which had formely been tentatively designated for use as landfill sites. Further actions of a similar nature are contemplated, thus reducing the estimates of the potential lifespans of such existing facilities.

To obtain a more comprehensive picture of the problem now facing this State, we have taken judicial notice of another report, released in 1972, which has further documented the crisis in this area.[7] According to this report, in 1972 almost 95% of New Jersey's solid waste was disposed of in landfills within the State. Further projections indicate that with the existing landfill acreage and the projected rate of dumping, all land that is presently committed to landfill operations will be exhausted by 1982. Also recognized is the strong probability that other environmental considerations may further limit the use for landfill purposes of much of the existing allocated acreage. Moreover, the HMD is singled out as an area where "[a] critical test of creative solid waste management is now taking place . . . ." The report estimated that by the end of 1975, the supply of acreage available for landfill in the

7. State of New Jersey County and Municipal Government Study Commission, Solid Waste: A Coordinated Approach (1972).

Meadowlands would be exhausted, an estimate very similar to those made by the HMDC and noted earlier in this opinion.

We are also aware that very little has yet been done in any really effective way—on either a national or an interstate level to achieve a satisfactory solution to this pressing problem. The scope of federal legislation is thus far quite limited. The Solid Waste Disposal Act, 42 U. S. C. A. § 3251 *et seq.*, originally provided only for "financial and technical [463] assistance and leadership . . ." to develop new methods to reduce the volume of waste and to provide for economical methods of disposal, 42 U. S. C. A. § 3251(a)(6). The Resource Recovery Act of 1970 amended the Solid Waste Disposal Act to provide financial assistance for the construction of solid waste disposal facilities and to furnish technical and financial assistance to promote and develop new methods of resource recovery. See *e.g.*, 42 U. S. C. A. §§ 3251(b)(1), 3254b. Although the Act as it now reads also provides for the encouragement of interstate cooperation to resolve the waste disposal problem, 42 U. S. C. A. §§ 3254, 3254a, nothing has been brought to our attention to indicate that New Jersey has entered into any agreement with her neighboring states of New York and Pennsylvania looking to this end.[8]

At the State level there has been more significant activity. In 1970 the Bureau of Solid Waste Management

8. In 1970, the Tri-State Transportation Commission [Connecticut, New York, and New Jersey] published a report entitled *Managing the Natural Environment—A Regional Plan for Water, Sewage, Air and Refuse*. The Commission, interestingly, foresaw the problem with which we are now faced, in its recognition that an interstate solution to the solid waste problem might be difficult to achieve because of increasing resistance to waste "imports." The Commission, therefore, recommended the continued use of landfill sites wherever possible along with regional development of large, efficient incinerators for the cities and inner suburbs. *Id.* at 32. To date, however, the Commission has been ineffective in bringing about the implementation of any of these suggestions.

of DEP published the *New Jersey State Solid Waste Management Plan*, which, among other proposals, recommended the creation of "Solid Waste Management Districts."[9] The *Solid Waste Management Plan* has been approved by the Federal Environmental Protection Agency as the official State plan for New Jersey.

Before the release of the *New Jersey Plan* in 1970, the Legislature had enacted the "Incinerator Authorities Law," [464] N. J. S. A. 40:66A-1 *et seq.*, delegating to municipalities the authority to provide solid waste collection and disposal facilities on a local basis. Prior thereto, in 1968, the "Solid Waste Management Authorities Law" had been enacted, N. J. S. A. 40:66A-32 *et seq.*, permitting the governing bodies of one or more municipalities to create solid waste management authorities to construct and operate incinerators and other solid waste treatment facilities. 1970, the year DEP released its *New Jersey Plan*, saw three further related enactments by the Legislature. The "Solid Waste Utility Control Act," N. J. S. A. 48:13A-1 *et seq.*, recognizing the need for state-wide control over the solid waste industry, provided that the Board of Public Utility Commissioners assume the duties of "regulating [the] economic aspects of solid waste collection, disposal and utilization service . . . ." N. J. S. A. 48:13A-2. The "County Solid Waste Disposal Financing Law," N. J. S. A. 40:66A-31.1, *et seq.*, took note of the fact that the cost of constructing disposal facilities would be prohibitive for many municipalities, and delegated to counties the authority to purchase or construct such facilities within the county "either alone or jointly with any municipality." N. J. S. A. 40:66A-31.4(1). Finally, the "Solid Waste Management Act," N. J. S. A. 13:1E-1 et seq., provided DEP with the

9. The Plan recommended either a "maximum sanitary landfill strategy" or a "maximum incineration strategy," depending on the availability of sanitary landfill acreage.

authority to "supervise solid waste collection and disposal facilities or operations," and to plan all future facilities having in mind that they should conform to "reasonably contemplated development of comprehensive community or regional solid waste collection and disposal facilities and operations and to any State-wide, regional, county and intercounty plans for solid waste management," N. J. S. A. 13:1E-4. These statutes are in addition to the Hackensack Meadowlands Reclamation and Development Act and the Waste Control Act that are earlier discussed above.

Supplementing these statutory provisions, the HMDC has recently announced blueprints to phase out all dumping [465] in the Meadowlands by 1979. It is currently planning to construct a baling plant to compact waste into solid, nonflammable building blocks that may then be used as the base of a 2,000 acre meadowlands park located upon existing landfill sites. Also projected is a resource-recovery plant.

Assuming that plans such as these formulated by the HMDC are implemented within the proposed time period, it is entirely reasonable to forecast that the extension of the lifespan of existing landfills, resulting from the exclusion of out-of-state waste, may be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes. Increasing the lifespan of the HMDC landfills would also alleviate future pressure on other landfills located throughout the State, to accept waste now handled by HMDC, thereby preventing any acceleration of their depletion and preserving lands in other areas of the State from becoming disposal areas.[10]

10. There is every indication that this was the true reason for the enactment of the amendments to the Waste Control Act. (L. 1973, c. 363). Following the promulgation of the regulations banning out-of-state dumping in HMDC, the out-of-state wastes were

III

It is in the light of these facts and with a full realization of the magnitude of the problem, that we address ourselves to the issue as to whether or not the statutes and regulations under attack must fall because they are found to constitute an impermissible burden upon interstate commerce. In both cases now before us the State preliminarily contends that the question of the significance of the burden should not be reached, as the movement of garbage [466] and refuse, things not of commercial value and harmful to the health and welfare of the citizens of the State, does not in fact constitute interstate commerce within the meaning of the constitutional phrase. Therefore, it is argued, any statutes or regulations prohibiting the importation of these deleterious and valueless substances would not violate the Commerce Clause. The HMDC regulations are broadly drawn to exclude all solid wastes collected or originating out-of-state, while the Waste Control Act, through the promulgation of regulations by DEP, has in effects been amended to exclude only that refuse which has no value either for fuel or recycling purposes.

The theory that objects harmful to the general public fall beyond the purview of the Commerce Clause has long been recognized by the United States Supreme Court. Perhaps the best articulation of this doctrine appears in *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 8 S. Ct. 689, 31 L. Ed. 700 (1888):

> • • • Doubtless the States have power to provide by law suitable measures to prevent the introduction into

10. (Cont'd.)
then carried to smaller landfill sites in New Jersey which had been originally designed to serve only neighboring municipalities. Thus, in order to prevent the total depletion of these landfills, a state-wide ban on solid waste imports was enacted.

> the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightly exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution. [125 U. S. at 489, 8 S. Ct. at 700, 31 L. Ed. at 708]

Accord, Baldwin v. Seelig, 294 U. S. 511, 525, 55 S. Ct. 497, 79 L. Ed. 1032, 1039 (1935); *Sligh v. Kirkwood*, 237 U. S. 52, 59-60, 35 S. Ct. 501 L. Ed. 835, 838 (1915). *See Crossman v. Lurman*, 192 U. S. 189, 196-97, 24 S. Ct. 234, 48 L. Ed. 401, 404 (1904); *Plumley v. Massachusetts*, 155 U. S. 461, 468, 472, 15 S. Ct. 154, 39 L. Ed. 223, 225, [467] 227 (1894). Also pertinent to the proposition that garbage or refuse is not an article of interstate commerce is the decision in *Clason v. Indiana*, 306 U. S. 439, 59 S. Ct. 609, 83 L. Ed. 858 (1939). That case involved the validity of an Indiana statute which required that within 24 hours after the death of certain large animals, the owners should burn or bury the carcasses or deliver them to a disposal plant licensed to do business within the state. Transportation for disposal to points outside the state was prohibited. 306 U. S. at 441, 59 S. Ct. 609, 83 L. Ed. at 860. The Supreme Court, after recognizing that the purpose of the statute was not discriminatory, but rather to promote the health of the people, concluded that no impermissible burden on interstate commerce had been shown to exist or as likely to occur. *Id.* at 444, 59 S. Ct. 609, 83 L. Ed. at 862.

The teaching of these cases seems to be that commodities or substances injurious to the public health are not "articles of commerce" within the meaning of the constitutional phrase. Their lack of market value coupled with their immediate threat to human health dictates that such substances not be afforded the protection of the Commerce Clause.

Nevertheless, refuse or solid waste may have intrinsic value of its own. As the trial judge noted in *Hackensack Meadowlands*, ". . . refuse may be utilized for construction, landfill, recycling of paper, bottles and metal, and production of electricity." 127 N. J. Super. at 170, 316 A. 2d at 716. Based on this factor, that court concluded that "the regulations in question here which are directed to the restricted use of sites for New Jersey garbage cannot be sanctioned on the concept that garbage is not a legitimate subject of interstate commerce." *Id.* We readily recognize that modern technology is such that certain types of solid waste may have legitimate market value for recycling or other purposes. We therefore agree with the decision below, insofar as the HMDC regulations are concerned, that they cannot be sustained on the theory that no item of interstate commerce [468] is involved, as these regulations do clearly attempt to exclude from the HMD even those types of wastes which may have some potentiality of useful renewal.

The amendments to the Waste Control Act, N. J. S. A. 13:II-9 and 13:II-10,[11] totally banning the disposal of solid

11. Quoted above in footnote 1.

waste originating out-of-state, also fail to make any provision for excepting those types of solid waste which may be renewed. Nevertheless, as we have pointed out, the DEP regulations, issued in response to this legislation, do except from the ban on out-of-state refuse those types of solid waste which may have a value for recycling or for use as fuel.[12] In view of the confining effect of this latter regulation, it is clear that an argument challenging the validity of the Waste Control Act on Commerce Clause grounds, unlike the argument challenging the HMDC regulations, cannot be premised on the existence here of "merchantable" items or legitimate "articles of trade," as those wastes which can be put to effective use are explicitly excepted from the ban. Any assertion that the Commerce Clause applies here must therefore rest on the proposition that the mere transportation and disposal of valueless waste between states constitutes interstate commerce within the meaning of the constitutional provision.

A short time ago, in *United States v. Pennsylvania Refuse Removal Ass'n.*, 242 F. Supp. 794 (E. D. Pa. 1965), *aff'd*, 357 F. 2d 806 (3d Cir.), *cert. denied*, 384 U. S. 961, 86 S. Ct. 1588, 16 L. Ed. 2d 674 (1966), the transportation and disposal of refuse was itself specifically found to constitute interstate commerce. That case was a Sherman antitrust action brought against an association of refuse removers in the greater Philadelphia area who collected in Pennsylvania but often dumped in New Jersey. 242 F. [469] Supp. at 796. The District Court found that the government had clearly met its burden of showing that defendants' business was commerce, and was interstate in nature. *Id.* at 796-97. The court emphasized that the real

12. DEP was enjoined by the decision below from enforcing these regulations as well as the relevant sections of the Waste Control Act. These regulations are quoted in footnote 2 above.

subject of "trade or commerce" was not the worthless garbage that was being transported but rather the valuable service of its removal and disposal. *Id.* at 799.

The *Pennsylvania Refuse* case affords an illustration of the part played by the Commerce Clause as justification for bringing a particular business scheme within the reach of a Congressional regulatory enactment. The Sherman Act purports only to prohibit as illegal *certain* combinations in restraint of trade or commerce, namely, those where the trade or commerce is interstate in nature. This is the *affirmative* aspect of the Commerce Clause—to support some exertion of federal control or regulation. Similarly, persons engaged in a disposal business, interstate in nature, have been found to come within the scope of the federal Fair Labor Standards Act. *Schultz v. Instant Handling, Inc.*, 418 F. 2d 1019 (5th Cir. 1969); *Barnett v. A-1 Scavenger Service Co.*, 466 S. W. 2d 150 (Mo. Ct. App. 1971). But we deal here, in the case before us, with what are customarily called the "negative implications" of the Commerce Clause, the extent to which it may be invoked—not to support an exercise of federal regulation—but rather to strike down or restrict state legislation. The Supreme Court has understandably adopted a very sweeping concept of the Commerce Clause in its affirmative application, in order to further the extent of Congressional control. A much more confined notion of the reach of this provision has, however, been manifested, as we shall see, when it has been invoked to prohibit or limit state action.

IV

Assuming for present purposes that the service of transporting and disposing of solid waste in the factual con- [470] text here presented is in fact interstate commerce in the constitutional sense, we next consider the contention that the relevant sections of the Waste Control

Act amount to an improper effort to regulate such commerce snice such control lies within the exclusive cognizance of the federal government. In considering this preemption argument in relation to the cases before us, we note initially that in the *Hackensack Meadowlands* case the trial court determined that in this area of solid waste disposal no such preemption is to be found. 127 N. J. Super. at 171, 316 A. 2d 711.

The need to determine whether, in a particular segment of interstate commerce, a state is precluded from acting because of federal preemption is the direct result of the landmark decision of the United States Supreme Court in *Cooley v. Board of Wardens,* 53 U. S. (12 How.) 299, 13 L. Ed. 996 (1851). There the Court for the first time clearly recognized that states have concurrent authority with the federal government to deal with those subjects of interstate commerce which do not necessarily require a national or uniform system of regulation. In a more recent statement appearing in *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963), Justice Brennan laid down the rule that a state would be precluded from acting only where either the "nature of the subject matter" or an "explicit declaration of congressional design" indicated that state efforts were to be precluded. *See* 373 U. S. at 143-152, 83 S. Ct. 1210, 10 L. Ed. 2d at 257-62.

The problem which arises in most instances where Congress has acted—as is here the case—results from there having been a failure on the part of Congress to make clear whether there was or was not a desire and intent on its part to exercise exclusive control in a particular area. The Supreme Court has recognized that "in the final analysis, there can be no one crystal clear distinctly marked formula," *Hines v. Davidowitz,* 312 U. S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581, 587 (1941), resort to which will in

all cases unequivocally reveal Congressional intent. *Benson, The Supreme* [471] *Court and the Commerce Clause,* 1937-1970 at 277-78 (1970).

Fortunately, although Congress has acted in this field through the passage of the Solid Waste Disposal Act of 1965 and its subsequent amendments, it has clearly indicated its intention not to preempt the area. As we have noted earlier, federal legislation has thus far been largely limited to providing "financial and technical assistance and leadership" to develop new methods of disposal and resource recovery and to reduce waste. In the Congressional findings is a pronouncement that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . . ." 42 U. S. C. A. § 3251(a)(6). We also note that severe budgetary cuts in recent years have reduced federal action even below that originally envisioned in the Solid Waste Disposal Act. For example, the Nixon Administration cut the federal solid waste budget from $30 million in 1973 to a projected $5.8 million for the fiscal year 1974, and sought to restrict the federal role to the control and disposal of hazardous wastes. No further funds were provided for such items as research and development, and technical assistance was substantially curtailed. See Environmental Law Institute, *Federal Environmental Law* 1307-1310 (1974).

It is entirely clear that the case for federal preemption must fail. Congress has encouraged state action; it has not precluded it.

V

In considering whether the statutes and regulations here under scrutiny do or do not constitute an impermissible regulation of interstate commerce, we bear in mind that the Constitution "was framed upon the theory

that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." *Baldwin v. Seelig, supra,* 294 U. S. 511, 523, 55 S. Ct. 497, 500, 79 L. Ed. 1032, 1038 (1935). Primarily the purpose sought to be served by including the Commerce Clause in the Constitution was to check or eliminate the *economic* discrimination among the states that had been so rampant under the Articles of Confederation. *E.g., Baldwin v. Seelig, supra,* 294 U. S. at 521-23, 55 [472] S. Ct. 497, 79 L. Ed. at 1037-38; *H. P. Hood & Sons, Inc. v. DuMond,* 336 U. S. 525, 533-35, 69 S. Ct. 657, 93 L. Ed. 865, 871-72 (1949); *Ribble, State and National Power Over Commerce* 3-4 (1937).

Despite this broad grant of power given Congress by the Commerce Clause, innumerable problems have continuously arisen. This is in large part because the states, in the exercise of their police power to protect the health, welfare and safety of their citizens, have passed many laws which often in effect do directly regulate interstate commerce. Thus over the years the United States Supreme Court has been called upon to arbitrate between these competing demands of state and federal power.

The cases before us present such a situation. We have no difficulty in finding, as did the courts below, that extending the lifespan of existing landfills and thereby preserving further acreage from use as disposal sites is a legitimate and valid exercise of the police power of the State. Our Appellate Division has recognized that garbage and refuse may provide a direct threat to the public health. *Shaw v. Byram Township,* 86 N. J. Super. 598, 602, 207 A. 2d 570 (App. Div.), certif. denied, 45 N. J. 35, 210 A. 2d 780 (1965) and indeed the point is self-evident. Likewise, the detrimental effects which sanitary landfills have upon the environment have been acknowledged:

> • • • Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property.* Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites. [*Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Commission,* 120 N. J. Super. 118, 122, 293 A. 2d 426, 428 (App. Div. 1972); emphasis in original]

[473]

We recognize, and now emphasize, that the objectives of the statutes and regulations in question are not only to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy. The Supreme Court has recognized that the protection of public health through the preservation of the environment is a valid, and indeed primary, objective of the police power. *Huron Portland Cement Co. v. Detroit,* 362 U. S. 440, 442, 80 S. Ct. 813, 4 L. Ed. 2d 852, 855 (1960). Today it cannot possibly be questioned that the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this power. See, for example, *Adams v. Shannon,* 7 Cal. App. 2d 427, 432, 86 Cal. Rptr. 641, 644 (Ct. App. 1970); Garton, *Ecology and the Police Power,* 16 S. D. L. Rev. 26 (1971).

Thus the underlying issue is whether or not this exercise of residual state power, obviously exerted for legitimate and important purposes, must fail because of the

demands of the Commerce Clause. We do not deem it necessary or useful to retrace in any particular detail the history of the negative implications of the Commerce Clause or the manner in which this body of doctrine has evolved through successive decisions of the Supreme Court. Dicta in *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 209, 6 L. Ed. 23 (1824) suggested that the intent of this grant of power to Congress had been to exclude entirely concomitant action on the part of the states. At least, however, since *Cooley v. Board of Wardens, supra*, 53 U. S. (12 How.) 299, 13 L. Ed. 996 (1851), it has been clear that state legislation will not necessarily be deemed unconstitutional simply because it can be shown that it may have some impact upon commerce that is interstate in nature. Over the years the Supreme Court has applied various tests and has adopted differing approaches in its treatment of the problem as to whether particular state legislation [474] does or does not fall within the interdict of this provision.

In 1938, in the case of *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734, the Court considered a South Carolina statute that had established size and weight limits for trucks using state highways. The result of enforcing the statute was to exclude many vehicles coming from other states that were engaged in interstate commerce. The Court found that the statute did not violate the Commerce Clause. In commenting upon this case, Professor Engdahl recently observed,

> [T]he court now [in *Barnwell*] formulated better than had been articulated before the test of the negative implications of the commerce clause. In Stone's words, the court is to inquire "whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means or regulation chosen are reasonably adopted to the end sought." 303 U. S. at 190 [58 S. Ct. 510]. [*Engdahl, Constitutional Power: Federal and State* (1974) § 11.03, p. 272]

In addressing the first of these criteria—whether the state legislature has acted within its province—at least two subordinate issues demand attention: can it be said that the subject matter of the legislation has been preempted by Congress, and is the enactment a valid and proper exercise of the state's police power. It was probably implicit in *Barnwell*, as it has been explicit in both earlier and later decisions, that state legislation must also meet a third test —whether the burden imposed on interstate commerce by the state statute exceeds or outweighs the benefit accruing to the state. Recent commentators have questioned whether this third "weighing" test should be, or will continue to be, applied. *Engdahl, op. cit. supra*, § 11.08, pp. 290-94; *Note*, 45 *Univ. of Col. Law Rev.* 487, 489 (1974). In any event it seems clear that it has not yet been entirely abandoned. *Pike v. Bruce Church*, 397 U. S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174, 178 (1970). *But see Brotherhood of Loco-* [475] *motive Firemen & Enginemen v. Chicago, Rock Island & Pacific R. R.*, 393 U. S. 129, 89 S. Ct. 323, 21 L. Ed. 2d 289 (1968).

In the case before us it is evident that the New Jersey Legislature—and the agencies that adopted implementing regulations—were looking to the accomplishment of a wholly legitimate end well within their competence. In seeking to prolong the useful lifespan of landfill areas within the state they were ministering to the needs of public health as well as endeavoring to preserve the environment. As we have indicated, there has very clearly been no federal preemption and the legislation is certainly

an appropriate exercise of the state's police power. *Cf. Oxford Consumer Discount Co. of North Philadelphia v. Stefanelli*, 102 N. J. Super. 549, 567-574, 246 A. 2d 460 (App. Div. 1968), modified, 104 N. J. Super. 512, 250 A. 2d 593 (App. Div. 1969), further modified, 55 N. J. 489, 262 A. 2d 874 (1970). Nor can it seriously be urged that the means employed were not suitable to the end sought to be attained. Less than total exclusion of solid waste generated outside New Jersey would have been of no avail. Even the means that have been adopted—apparently the best available—offer no certainty of providing more than much needed time within which to devise by technological effort and ingenuity a satisfactory ultimate solution. Nor has there been discrimination, at least in the economic sense. In examining this point we must look to the ends sought to be achieved. Here the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions. Nor is there any real or significant discrimination in favor of local collectors. Refuse amassed by them outside the State may not be brought into New Jersey. Conversely, residents of other states are free to collect and dump within the state.

The further step in the testing process would require us to assay the burden on interstate commerce and to weigh it against [476] the benefit to the state. The burden is slight indeed. There is nothing to indicate that adequate alternatives are not available in both New York and Pennsylvania. The City of Yonkers has access to the Croton dump in New York at a modest increase in cost of five dollars per ton. Philadelphia's stated alternatives are either to install adequate air pollution devices in their existing incinerators or to establish new landfill sites outside the city, which would require the purchase of additional disposal trucks. When balanced against the dangers

to public health and to the environment that this legislation seeks to avert, these relatively small costs and modest inconveniences seem minor indeed.

Other state and federal courts in very recent years have not hesitated to sustain legislation having as its aim the protection of health and the maintenance of environmental values and natural resources against attacks based upon alleged violations of the Commerce Clause. *American Can Co. v. Oregon Liquor Control Commission*, 15 Or. App. 618, 517 P. 2d 691 (1973) (ban on non-returnable beverage containers); *Proctor & Gamble Co. v. City of Chicago*, 509 F. 2d 69 (7th Cir. 1974), *cert. denied* 421 U. S. 978, 95 S. Ct. 1980, 44 L. Ed. 2d 470 (1975) (ban on phosphate detergents); *Portland Pipe Line Corp. v. Environmental Improvement Commission*, 307 A. 2d 1 (Sup. Jud. Ct. Me. 1973), appeal dismissed, 414 U. S. 1035, 94 S. Ct. 532, 38 L. Ed. 2d 326 (1973) (prevention and control of marine oil spillage); *Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F. 2d 897 (9th Cir. 1975) (ban on further building).[13]

We know that not every hindrance to interstate commerce that may result from a state law will be deemed sufficient to invalidate the legislation. We know too and are constantly becoming more acutely aware that the environmental resources as well as ecological and human values that have [477] become so endangered upon this "plundered planet," insistently demand every reasonable protection that can possibly be recruited.

In this area the state has not only a right to protect its own resources, but also the duty to do so, in the interest of its citizens, as well as others. We are not here concerned with the problem presented in such cases as *West v.*

13. A similar legislative ban on the importation of waste materials has been enacted in the State of Maine. See *Maine Rev. Stat. Ann. Title* 17, § 2253 (Supp. 1974-75).

Natural Gas Co., 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911) and *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923). There the Court was called upon to review state statutes restricting the flow of natural gas to citizens of the state in question. Quite understandably it was found that the enactments did violence to the Commerce Clause. In those cases the state effort was to preserve and exploit a resource for selfish economic and commercial gain; here it is to protect the health of its citizens and give some measure of precarious protection to its natural environment. The distinction is clear and it is basic. We know that there resides in each of the several states a power to protect its natural resources. This power is part of what has been called its quasi-sovereignty. In *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907), the Supreme Court entertained an original action by the State of Georgia, in which the latter sought to restrain an out-of-state manufacturer from permitting deleterious fumes to be blown into the plaintiff state and do damage to trees, fields and crops. In determining that an injunction would issue, practically as of right, Justice Holmes said,

> The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. [478] It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. [206 U. S. at 237, 27 S. Ct. at 619, 51 L. Ed. at 1044]

It is true that there the Court dealt with a nuisance, which is not present here. Yet, the case has relevant import. The protection to its environment and natural resources that a state can demand of right from a federal court should be equally available to it by way of protective legislation. We do not mean to be understood as saying that every assertion of a state's quasi-sovereign right to protect its environment, ecological values and natural and human resources will be sustained regardless of the impact upon interestate commerce. Clearly this is not so. But where the effect upon trade and commerce is relatively slight, as is here the case, and where at the same time the values sought to be protected by the state legislation are as crucial to the welfare of its citizens as is here true, we have no hesitancy in sustaining the state action.

The judgments of the respective trial courts are hereby reversed; all stays or injunctive orders are vacated.

For affirmance in both cases: Chief Justice HUGHES, Justices MOUNTAIN, SULLIVAN, PASHMAN and CLIFFORD and Judge COLLESTER—6.

For reversal: None.

Supreme Court of the United States

No. 75-1150

City of Philadelphia et al., Appellants, v. State of New Jersey et al. — On Appeal from the Supreme Court of New Jersey.

[February 23, 1977]

PER CURIAM.

This suit challenges the constitutionality of a New Jersey statute prohibiting any person from bringing into New Jersey "any solid or liquid waste which originated or was collected outside the State," except garbage to be fed to swine. New Jersey Pub. L. 1973, c. 363. The New Jersey Supreme Court held that the act was not pre-empted by a federal statute addressing questions of waste disposal, the Solid Waste Disposal Act of 1965, 42 U. S. C. § 3251 *et seq.*, and was not unconstitutional as discriminatory against or placing an undue burden on interstate commerce. *City of Philadelphia et al. v. State of New Jersey et al.*, 68 N. J. 451 (1975). We noted probable jurisdiction on April 5, 1976, 425 U. S. 910 (1976).

On October 21, 1976, the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U. S. C. §6901 *et seq.* became law. The parties at the Court's request supplemented their briefs to address the question of the impact of the new federal statute on the New Jersey Act. Appellants argue that the Act displaces the New Jersey law, and appellees argue that it does not pre-empt or in any way undercut the validity of the New Jersey legislation. While

federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, analysis of pre-emption issues depends primarily on statutory and not constitutional interpretation. Therefore, it is appropriate that the federal pre-emption issue be resolved before the constitutional issue of alleged discrimination against or undue burden on interstate commerce is addressed. We think it appropriate that we have the views of the New Jersey Supreme Court on the question whether or to what extent the Resource Conservation and Recovery Act of 1976 pre-empts the New Jersey statute. The judgment of the New Jersey Supreme Court is therefore vacated and the case remanded for reconsideration in the light of the Resource Conservation and Recovery Act of 1976.

So ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

The Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U. S. C. § 6901 *et seq.* evidences a federal concern with the growing problem of waste disposal in this country. This complex statute attempts to deal with this problem in a variety of ways. Because the impact of the statute will depend in part on the regulations promulgated under it, generalizations at this time as to the effect of the statute should be made with caution. But I do think it is abundantly clear from the text of the statute and from its legislative history that Congress did not intend to pre-empt state laws such as the one at issue here. In its report on the statute the House Committee on Interstate and Foreign Commerce recognized the existence of state laws simi-

lar to this New Jersey law. H. R. Rep. No. 94-1491, 94th Cong., 2d Sess., 3, 10. The report explicitly disclaimed any pre-emptive intention.

> "It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative." *Id.*, at 33.

In view of this express disclaimer, I do not understand how the Court can assume that pre-emption remains an open question.

We should decide this case on the merits and not burden the parties and the Supreme Court of New Jersey by a remand which unnecessarily creates delay, expense, and uncertainty.

SUPREME COURT OF NEW JERSEY
A-82 September Term 1974

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DE LORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,
Defendants-Appellants.

Argued May 10, 1977. Decided June 20, 1977

On Remand from the Supreme Court of the United States.

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for appellants (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Skillman* of counsel and on the brief; *Mr. Peter Herzberg* and *Mr. Nathan M. Edelstein*, Deputy Attorneys General, on the brief).
Mr. Herbert F. Moore argued the cause for respondents (*Messrs. Jamieson, McCardell, Moore, Peskin and Spicer*, attorneys; *Mr. Moore* of counsel; *Mr. Meisel*, on the brief).

The opinion of the Court was delivered by
MOUNTAIN, J.

On November 18, 1975, this Court rendered its decision in *Hackensack Meadowlands v. Municipal Landfill Authority,* 68 *N. J.* 451. The opinion upheld the constitutionality of *L.* 1973, *c.* 39, as supplemented by *L.* 1973, *c.* 363, known as the Waste Control Act, *N. J. S. A.* 13-1I-1 *et seq.* The principal purpose of this statute is to prohibit the disposal within New Jersey of waste originating out of state.

Plaintiffs appealed to the Supreme Court of the United States, where probable jurisdiction was noted April 5, 1976, 425 *U. S.* 910, 47 *L. Ed.* 2d 760, *sub nom. City of Philadelphia v. State of New Jersey.* During the course of oral argument before the Supreme Court on November 3, 1976, it was brought to the attention of that Court that twelve days prior thereto the President had signed into law the Resource Conservation and Recovery Act of 1976, *Pub. L.* 94-580, 42 *U. S. C. A.* § 6901, *et seq.* This statute expands the federal role with respect to the disposal of solid wastes. In compliance with an order dated November 15, 1976, the parties filed supplemental briefs in the Supreme Court addressed to the issue as to the effect this act might have upon the constitutionality of the New Jersey legislation. On February 2 1977 the Supreme Court, with four justices dissenting, issued a *per curiam* opinion vacating the judgment of this Court entered November 18, 1975 and remanding the case for reconsideration in light of the foregoing Congressional enactment. *City of Philadelphia v. State of New Jersey,* — U. S. —, 51 *L. Ed.* 2d 224. More specifically the opinion formulated the issue for determination on remand in these words,

> We think it appropriate that we have the views of the New Jersey Supreme Court on the question whether or to what extent the Resource Conservation and Recovery Act of 1976 pre-empts the New Jersey statute.
>
> [— *U. S.* at —, 51 *L. Ed.* 2d at 226]

We have carefully examined the Congressional enactment as well as the materials bearing upon its history, and have had the benefit of briefs and argument of counsel addressed to the issue so presented. In our opinion, for the reasons set forth below, we believe the Congressional enactment does not effect federal pre-emption either as to the disposal of hazardous waste or with respect to any other area of solid waste disposal. In order that the basis for our conclusion may be fully comprehended we proceed to examine the two major subchapters of the federal act. Even though hazardous waste disposal is not clearly at issue in this case, we deem it appropriate to consider initially the subchapter of the Act which addresses that problem.

I

Subchapter III of the Act (42 *U. S. C. A.* §§ 6921-6931) is entitled, "Hazardous Waste Management." In this portion of the statute there is set forth a comprehensive program for the disposal of hazardous waste. The latter is defined as,

> . . . a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed

of, or otherwise managed. [42 *U. S. C. A.* § 6903(5)] [1]

It seems clear that it would include nuclear waste.

The Administrator of the Environmental Protection Agency is directed to ". . . develop and promulgate criteria for identifying the characteristics of hazardous waste . . . taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." 42 *U. S. C. A.* § 6921(a). Based upon such study, particular hazardous wastes are to be identified, the list to be revised from time to time as may be appropriate. *Id.*

The sections of the statute immediately following very carefully set forth detailed standards to be applied to (1) generators of hazardous waste (42 *U. S. C. A.* § 6922); (2) transporters of hazardous waste (42 *U. S. C. A.* § 6923); and (3) owners and operators of hazardous waste treatment, storage, and disposal facilities (42 *U. S. C. A.* § 6924). This hazardous waste program is not an exclusively federal venture. Individual states are authorized to develop their own hazardous waste control and disposal programs subject to the approval of the Administrator. 42 *U. S. C. A.* § 6926(b). Significantly, under a section entitled "Retention of State Authority," the states are prevented from imposing hazardous waste requirements less stringent than those authorized by the federal guidelines (42 *U. S. C. A.* § 6929). If a state-enacted program deviates from the federal mandates the Administrator has the power to withdraw federal approval (42 *U. S. C. A.* § 6926(e)).

1. *N. J. S. A.* 13:1I-3(c) contains a definition of "solid waste" expansive enough to exclude from disposal in New Jersey "hazardous waste" as that term is defined in the federal act.

This Subchapter may fairly be characterized as an effort to achieve a degree of uniformity in hazardous waste control. The federal guidelines pertaining to parties involved in the generation, transportation and disposal of such waste establish a minimum national standard below which a state hazardous waste program may not operate. However, the Act does not prevent the State from imposing more stringent standards to hazardous waste operations within its borders. New Jersey has done just this through the enactment of *N. J. S. A.* 13:1I-1 *et seq.*

We view this ban on disposal of waste originating out-of-state as entirely consistent with the federal program. That the federal hazardous waste guidelines and the New Jersey prohibition of out-of-state waste can function smoothly together is illustrated by using a hypothetical New Jersey hazardous waste disposal plant as an example. Once the federal regulations establishing performance standards are promulgated,[2] this plant will be required to comply with announced guidelines pertaining to record-keeping, reporting systems, plant design and training of personnel (42 *U. S. C. A.* § 6924(1)-(7)). The sole state restriction imposed upon the operation of the plant will be the ban on the receipt of hazardous waste which originated outside of New Jersey. *N. J. S. A.* 13:1I-10. It is readily apparent that both the federal and state regulations operate without conflict. The New Jersey plant will be in strict compliance with all federal requisites even though out-of-state wastes are prohibited.

The critical inquiry relevant to federal pre-emption is "whether both [federal and state] regulations can be enforced without impairing the federal superintendence of

2. It should be noted that as of this date no federal regulations have been promulgated. It is clearly established that potential federal regulation of a subject matter by a federal agency does not pre-empt present regulation by the states. *Welch Co. v. New Hampshire*, 306 U. S. 79, 84-85, 83 L. Ed. 500, 504-505 (1939).

the field. . . ." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 *U. S.* 132, 142, 10 *L. Ed.* 2d 248, 256-57 (1963). Having concluded that "federal superintendence" of the field of hazardous waste is indeed unimpaired we perceive no federal pre-emption resulting from Subchapter III.

II

Subchapter IV of the Congressional enactment (42 *U. S. C. A.* §§ 6941--6949) is entitled "State or Regional Solid Waste Plans." This portion of the Act deals with the treatment and disposal of *non-hazardous* solid wastes, materials that are or may become "environmentally sound," 42 *U. S. C. A.* § 6941, and that may either be reclaimed or disposed of with a minimum of danger to human life and health. It is with wastes of this sort that we are here directly concerned.

As to the disposal of solid waste of a non-hazardous nature, it also seems clear that there has been no federal pre-emption by virtue of this statute. On the contrary, as will be seen, the Act affirmatively encourages state action and expressly eschews any intent on the part of Congress to do more than offer guidance together with technological and fiscal support.

It is well-settled today that pre-emption deriving from federal legislation must take the form of "an unambiguous Congressional mandate." *Florida Lime and Avocado Growers, Inc. v. Paul, supra*, 373 *U. S.* at 147, 10 *L. Ed.* 2d at 259 (1963). Where no such mandate is discernible, there will be no pre-emption. The Supreme Court appears to have been especially reluctant to find an intent to pre-empt where state legislation has been enacted to serve local environmental interests, *Askew v. American Waterways Operators*, 411 U. S. 325, 36 *L. Ed.* 2d 280 (1973), or to protect public health. *Huron Portland Cement Co. v.*

Detroit, 362 *U. S.* 440, 4 *L. Ed.* 2d 852 (1960). Our state statute, as was made clear in this Court's earlier opinion, 68 *N. J.* at 472-73, is an exercise of the police power of this State enacted in the interest of protecting the environment of New Jersey and the welfare of its citizens, *i.e.*, the public health.

The intent of Congress to leave this power with the several states, insofar as the disposal of non-hazardous waste is concerned, is clearly manifest. The report on these statutory provisions of the House Committee on Interstate and Foreign Commerce, *H. R. Rep.* No. 94-1491, 94th *Cong.* 2d Sess. is explicit.

> The Federal guidelines published pursuant to Title IV are not mandatory upon the states . . . .
>
> [*Id.* at 5]

> It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative.
>
> [*Id.* at 33]

> [T]he provisions of this legislation, specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning.
>
> [*Id.*]

Senator Randolph, a co-sponsor of the bill, had this to say,

> In developing this legislation, the members of the Committee on Public Works recognized that solid waste is a uniquely local problem and that programs in this area should be developed and managed at the local government level.

This is not an area which lends itself to extensive planning and operation from the Federal level. The role of the Federal Government in solid waste activities should be one primarily of providing financial and technical assistance. Guidelines authorized by this legislation are to be descriptive of the options available to local and regional bodies responsible for solid waste management. These guidelines should not be taken as directives from the Federal Government for a position by the local authorities.

Guidelines should provide the States and area planning agencies with maximum flexibility, while assuring that such agencies or organizations have adequate information to effectively implement the planning provisions.

To assure that the federal Government adopts a proper place in this program, I emphasize the Administrator of the Environmental Protection Agency is required to notify the Congress before the publication of guidelines, information or model codes, ordinances or statutes. The agency is restricted under the provisions of the bill from advocating specific policy alternatives at the State or local level. These matters are best left—and I emphasize this—to local choice since they involve substantial regional variations. It is not appropriate for the Environmental Protection Agency to become involved other than in the provision of technical assistance on request.

[122 *Cong. Rec.* 11069 (1976)]

The statute itself (Subchapter IV) is a blueprint for state action to be accompanied by federal guidance and assistance. First there are set forth the objectives of Subchapter IV:

The objectives of this subchapter are to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources and to encourage conservation. Such objectives are to be accomplished through Federal technical and financial assistance to States or regional authorities for comprehensive planning pursuant to Federal guidelines designed to foster cooperation among Federal, State, and local governments and private industry. [42 *U. S. C. A.* § 6941]

The Congressional plan for the attainment of these objectives follows. The federal Administrator of the Environmental Protection Agency is directed to "publish guidelines for the identification of those areas which have common solid waste management problems and are appropriate units for planning regional solid waste management services." 42 *U. S. C. A.* § 6942(a). At a later date, probably some time in 1978, the Administrator is to issue further guidelines, these "to assist in the development and implementation of State solid waste management plans." 42 *U. S. C. A.* § 6942(b).

The State plan is seen as the operational vehicle by and through which the statutory objectives are to be accomplished. Minimum requirements for federal approval of any such plan are set forth. 42 *U. S. C. A.* 6943. Disposal must be by sanitary landfill; open dumps are no longer to be permitted. 42 *U. S. C. A.* §§ 6944-45. Within an allotted span of time the Governor of each state, acting in concert with elected local official and aided by the guidelines promulgated at the federal level, is to identify regions within the state as being appropriate areas within which to carry out programs of solid waste management and disposal. 42 *U. S. C. A.* 6946. Provision is made

for interstate regions where this is suggested by the federal guidelines and approved by representatives of the respective states. *Id.* Upon approval of a State plan by the Administrator of the Environmental Protection Agency, the State becomes entitled to apply for and receive federal financial assistance. 42 *U. S. C. A.* 6947.

The position of the plaintiffs before this Court on remand from the Supreme Court is stated in their brief as follows:

> Plaintiffs do not urge that *P. L.* 1973, *c.* 363 has been preempted under the Commerce Clause. They do, however, submit that said statute must fall under the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 *U. S.* 52, 67 (1940).
>
> [*Plaintiffs' Brief*, p. 4]

They argue further that if a region lying partially within each of two or more states is identified by the federal Administrator of Environmental Protection as an appropriate unit for planning regional solid waste management services under 42 *U. S. C. A.* § 6942(a), then the respective Governors of the states in question are *required* by the federal statute to agree upon and fix the precise boundaries of the region and to develop a plan of solid waste disposal for the area so laid out. The argument concludes by asserting that the Governors and other involved state officials have no discretion in the matter, that Congress has mandated that the action be taken.

We have no hesitancy in rejecting this contention. The statute (Subchapter IV) cannot be so read. We need not address the underlying difficulties that such a construction would pose, since we are satisfied that as a matter of statutory construction, Congress intended to leave to each state the decision as to whether it will or will not accept recommendations set forth in federal guidelines and adopt, or not adopt, a State plan qualifying for federal approval. The only sanction deriving from the statute, in the event of non-compliance, is an ineligibility to receive federal funds and perhaps technological aid. As the House Report explains,

> If those [statutory] objectives are not met, the states and local authorities within the states will lose the federal or technical assistance. However, the provisions of this legislation, specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning.
>
> [*House Report, supra*, at 33]

The Federal guidelines published pursuant to Title IV are not mandatory upon the states.

[*Id.* at 5]

Furthermore *L.* 1973, *c.* 363, forbidding the disposal within New Jersey of solid and liquid wastes originating elsewhere, is not presently in conflict with any federal proposal or guideline, since none has been made or promulgated. When federal guidelines as to proposed regions are in fact published, they may not even suggest or recommend that any part of New Jersey be joined with the City of Philadelphia in a common region. On the other hand, if such a suggestion or recommendation were to be made the Governor of Pennsylvania or the Governor of New Jersey may fail to approve it. Finally, should such a proposal be made and approved by both states, this statute need not frustrate fulfillment of the proposal. The New Jersey Commissioner of Environmental Protection could simply exercise his statutory authority to decide that under

such circumstances the introduction of out-of-state waste could be ". . . permitted without endangering the public health, safety and welfare. . . ." *N. J. S. A.* 13:1I-10.

In brief recapitulation, it is our conclusion that the Resource Conservation and Recovery Act of 1976 does not pre-empt the control and management of hazardous solid waste disposal. Parenthetically, we note again that this case is not directly concerned with the disposal of hazardous waste, nor do plaintiffs contend otherwise. It is our further conclusion that in no other field or area of waste disposal does the act effect any federal pre-emption. In fact it gives strong encouragement to the several states to take positive action on their own, supported by federal assistance and direction in the form of funds, technological aid and guidelines. We reject plaintiffs' argument based upon the Supremacy Clause, since we interpret Subchapter IV of the statute as offering incentives for desired action, but mandating nothing. The New Jersey statute is in conflict with no federal regulation or proposal, since none exists. Should federal guidelines be promulgated the statute presents no barrier against compliance nor to achieving effective interstate or regional cooperation.

After the remand from the Supreme Court of the United States, the Attorney-General filed a motion with this Court seeking, inter alia, the authority immediately to enforce *L.* 1973, *c.* 363. Originally, by order of December 11, 1975, we vacated a previous stay of judgment and authorized the immediate implementation of the statute in accordance with our decision of November 18, 1975. By order dated April 4, 1977, we reserved decision on the pending motion for a stay and directed that counsel address themselves to the issue so presented at the same time the meritorious issue posed on remand was argued. This was done. Plaintiffs resist the Attorney-General's application, urging that the *status quo* be maintained pending

their prospective application for further relief to the Supreme Court of the United States. The reasons which motivated us to deny plaintiffs' application for a stay of judgment following the rendition of our decision in November, 1975, are as compelling today as they were then. Additionally, we note that meanwhile a period of 18 months has elapsed.

The motion of the Attorney-General is granted to permit the prompt enforcement of *L.* 1973, *c.* 363 in accordance with our earlier decision, to take effect, however, only after the expiration of 30 days from the date of this opinion which we consider a reasonable period of time to afford plaintiffs full opportunity to apply to the Supreme Court of the United States for a stay of judgment, should they determine to do so.

In conclusion, we reaffirm the views expressed in our earlier opinion, reported in 68 *N. J.* 451 (1975), as well as the judgment there set forth, supplemented and modified by what is stated above.

Chapter 363 Laws of N. J. 1973
Approved January 2, 1974.

STATE OF NEW JERSEY

INTRODUCED NOVEMBER 12, 1973

By Senators WALLWORK, HAGEDORN and HIRKALA

(Without Reference)

AN ACT to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State and supplementing the "Waste Control Act," approved February 21, 1973 (P. L. 1973, c. 39).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:11-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.

2. No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, °*except garbage to be fed to swine in the State of New Jersey,*° until the commissioner

shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act," P. L. 1973, c. 39.

3. This act shall take effect on the first day of the first month following its enactment.

ADMINISTRATIVE ORDER NUMBER FORTY.

(Adoption of Emergency Rule.)

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
RICHARD J. SULLIVAN, COMMISSIONER
TRENTON

WHEREAS, Governor T. Cahill, on January 2, 1974, did sign into law Chapter 363 of the Public Laws of 1973, an Act prohibiting the importation into New Jersey of solid and liquid wastes generated outside the the State, effective February 1, 1974; and

WHEREAS, that Act permits the Commissioner of the Department of Environmental Protection to promulgate regulations permitting and regulating the treatment and disposal of out of state wastes upon determining that such action can be permitted without endangering the public health, safety and welfare; and

WHEREAS, the President of the United States and Governor William T. Cahill have recognized and declared that a critical shortage of fuel exists throughout New Jersey and the Nation; and

WHEREAS, there is substantial evidence that the manufacture of reusable materials from recycled solid waste consumes less energy than the manufacture of those same materials from virgin materials; and

WHEREAS, viable processes exist for the production of useful and necessary energy and energy producing fuels from municipal solid waste; and

WHEREAS, the recycling and recovery of secondary materials from solid waste conserve and protect many valuable and diminishing natural resources; and

WHEREAS, New Jersey is one of the nation's leading producers of chemicals and petrochemicals and, therefore, produces substantial quantities of diverse hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes; and

WHEREAS, in order to preserve and protect the quality of New Jersey's environment, the Department of Environmental Protection has proposed rules which would prohibit the disposal of such hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes at conventional sanitary landfills within the State; and

WHEREAS, the proper treatment, processing or recovery of hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes frequently requires the use of elaborate processes and equipment; and

WHEREAS, it is apparent that the economic survival of solid waste facilities utilizing such elaborate processes and equipment for the proper treatment, processing or recovery of hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes generated within the State is dependent upon the acceptance of those wastes generated or collected outside the territorial limits of this State; and

WHEREAS, the imminent ban upon the importation into this State of wastes intended for resource recovery and recycling facilities, and of those hazardous, chemical, pesticide, bulk liquid and bulk semi-liquid wastes intended for treatment, processing or recovery facilities presents both an immediate and long-term peril to public health, safety and welfare.

NOW THEREFORE, under the powers and duties conferred upon me by the New Jersey Administrative Procedure Act, N. J. S. A. 52:14B-4(c) and N. J. A. C. 15:15-4.18 et seq. which empowers the Commissioner of the Department of Environmental Protection to adopt, amend

or repeal an administrative rule whenever the Commissioner determines that an imminent peril to public health, safety and welfare exists, I do hereby adopt the following rules:

N. J. A. C. 7:14 IMPORTATION OF SOLID AND LIQUID WASTE FROM OUTSIDE NEW JERSEY.

N. J. A. C. 7:1-4-1 *Definitions.*

"Bulk Liquid" or "Bulk Semi-Liquid" means liquid or semi-liquid in the quantity of fifty-five (55) gallons or more.

"Chemical Waste" means discarded material-resulting from any manufacturing process or other procedure which is or can become chemically active.

"Department" means the Department of Environmental Protection.

"Hazardous Waste" means any waste or combination of wastes which pose a substantial present or potential hazard to human health or living organisms, because they can be biologically magnified, or because they can be lethal, or because they may otherwise cause detrimental cumulative effects. They shall include waste materials that are (1) toxic or poisonous; (2) corrosive; (3) irritating or sensitizing; (4) radioactive; (5) biologically infectious; (6) explosive; (7) flammable; and present a significant hazard to human health and/or the environment. They include, but are not limited to, those materials and concentrations of materials that are determined to be toxic by the Federal Secretary of Health, Education and Welfare pursuant to section 20(6) of the Occupational Safety and Health Act of 1970 (Public Law 9-596) and those listed in Part 172, Title 49 of the Code of Federal Regulations issued by the Federal Department of Transportation.

"Liquid Waste" means any waste which exists in the liquid state at standard conditions (70 F and 29.92 in Hg.).

"Pesticide" means any substance or mixture of substances labeled, designed, intended for or capable of use in preventing, destroying, repelling, sterilizing or mitigating any insects, rodents, nemotodes, predatory animals, fungi, weeds and other forms of plant or animal life or viruses, except viruses on or in living man or other animals. The term "pesticide" shall also include any substance or mixture of substances labeled, designed or intended for use as a defoliant, desicant or plant regulator.

"Recycling or Reclamation Facility" means any place, equipment, or plant designed and operated to collect, store, or process and to redistribute separated materials so as to return the material to the raw materials market.

"Resource Recovery Facility" means any place, equipment, or plant designed and operated to separate or process municipal solid waste into usable secondary materials, including fuel and heat.

"Secondary Material" means previously used raw material.

"Semi-Liquid" means solid matter in a liquid media (e.g., a slurry).

"Solid Waste" means garbage refuse, sludge, and other discarded solid materials resulting from industrial, commercial, and agriculture operations and from community activities, and all other waste materials including liquids disposed of incident thereto except solid animal and vegetable wastes collected by swine producers licensed by the State Department of Agriculture to collect, prepare, and feed such wastes to swine on their own farms.

N. J. A. C. 7:1-4.2 *Out-Of-State Waste.*

No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This section shall not apply to:

(a) Garbage to be fed to swine in the State of New Jersey;

(b) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste and that is intended for a recycling or reclamation facility;

(c) Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70% of the thru-put of any such facility is to be separated or processed into usable secondary materials; and

(d) Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recoverd in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State.

N. J. A. C. 7:1-4.3 *Effective Date.*

These rules shall take effect on February 1, 1974.

THE FOREGOING IS HEREBY ADOPTED AND EFFECTIVE THIS ——— DAY OF JANUARY, 1974.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

By: RICHARD J. SULLIVAN
Richard J. Sullivan
Commissioner

Filed January 22, 1974.

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Attorneys for Plaintiffs.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION
DOCKET NO. L 15068.73 P. W.
Civil Action

CITY OF PHILADELPHIA, a municipal corporation of the Commonwealth of Pennsylvania, CITY OF GLEN COVE, a municipal corporation of the State of New York, LANDFILL AND DEVELOPMENT COMPANY, a New Jersey corporation, MAC SANITARY LANDFILL, INC., a New Jersey Corporation, KINSLEY'S LANDFILL, INC., a New Jersey corporation, and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a New Jersey Corporation,
Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,
Defendants.

COMPLAINT
IN LIEU OF PREROGATIVE WRITS.

Plaintiffs, City of Philadelphia, c/o David J. Damiano, Commissioner, Department of Streets, 340 Municipal Services Building, Philadelphia, Pennsylvania, 19107, City of Glen Cove, c/o David Quient, Esq., City Attorney, 5 Highland Road, Glen Cove, New York, 11542, Landfill and Development Company, Route 38, R. D. #1, Mt. Holly, New Jersey, M. A. C. Landfill, Inc., Routes 41 and Clements Bridge Road, Deptford, New Jersey, Kinsley's Landfill, Inc., Routes 41 and 47, Deptford, New Jersey and DeLorenzo-Interstate Waste Removal Co., Inc., 208 Paterson Avenue, Trenton, New Jersey, in complaining against defendants, say:

COUNT I.

1. Plaintiff landfills are public utilities of the State of New Jersey and hold duly issued temporary certificates of public convenience and necessity issued by the New Jersey Public Utility Commission.

2. Each said landfill duly and timely filed an application with the New Jersey Department of Environmental Protection, Solid Waste Management Bureau, for the issuance of a sanitary landfill registration certificate pursuant to N. J. A. C. 7:26-2.2 &c.

3. Plaintiff Landfill and Development Company operates a sanitary landfill on a tract of land consisting of approximately 200 acres situated in the Townships of Mount Holly, Eastampton and Lumberton in the County of Burlington and State of New Jersey, which landfill site has been leased from plaintiff DeLorenzo-Interstate Waste Removal Co., Inc.

4. Plaintiff M. A. C. Landfill, Inc. operates a sanitary landfill on a tract of land consisting of approximately 87 acres situated in the Township of Deptford, County of Gloucester and State of New Jersey.

5. Plaintiff, Kinsley's Landfill, Inc., operates a sanitary landfill on a tract of land consisting of approximately 380 acres situated in the Township of Deptford, County of Gloucester and State of New Jersey.

6. Each landfill treats and disposes of solid waste which originated or was collected outside the State of New Jersey, including considerable solid waste collected in the City of Philadelphia, Pennsylvania.

7. Plaintiff City of Philadelphia has entered into a written agreement with each of the aforesaid plaintiff landfills for the treatment and disposal of a substantial portion of its solid waste. Plaintiff City of Glen Cove disposes of a substantial portion of the solid waste originating or collected in said city in sanitary landfills located in the State of New Jersey.

8. By virtue of the Solid Waste Management Act (1970), N. J. S. A. 13:1E-1 *et seq.*, the Department of Environmental Protection of the State of New Jersey was granted the power and authority to promulgate rules and regulations governing solid waste disposal in the State of New Jersey.

9. On February 21, 1973, the Governor of the State of New Jersey approved A. 1132 (P. L. 1973, c. 39) known as the Waste Control Act, N. J. S. A. 13:1I-1 *et seq.*

10. Said Act, which became effective March 1, 1973, is entitled as follows:

> AN ACT to control and regulate the treatment and disposal within this State of solid and liquid waste collected outside the State, empowering the Commissioner of Environmental Protection to adopt rules and regulations and prescribing penalties for violations.

11. Pursuant to paragraph 4 of the Waste Control Act, the Commissioner of Environmental Protection is granted the power to prohibit "the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State". N. J. S. A. 13:1I-4a.

12. In accordance with the authority conferred by N. J. S. A. 13:1E-1 *et seq.* and N. J. S. A. 13:1I-1 *et seq.*, and as part of a proposed Revision to the Rules of the Bureau of Solid Waste Management, the Commissioner of Environmental Protection proposed as follows:

7:26-1.8 *Out of State Waste*

—1.8.1 No person engaged in the collection and/or haulage of solid waste shall dispose of any solid waste which originated or was collected outside the territorial limits of this State in any solid waste facility located within the territorial limits of this State.

—1.8.2 No person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside the territorial limits of this State.

13. The effect of the aforesaid portion of the proposed rule is to completely prohibit the disposal in the State of New Jersey of any solid waste which originated or was collected outside the territorial limits of the State.

14. The principal basis and background advanced by the Department of Environmental Protection to support the proposed prohibition was to assure the availability of landfill acres in New Jersey for solid waste generated in this State, and as an incident thereto, to stabilize the cost of solid waste collection and disposal for New Jersey residents.

15. The power and authority to regulate the rates and public utility aspects of the solid waste collection and disposal industry has been conferred upon the Board of Public Utility Commissioners pursuant to the Solid Waste Utility Control Act of 1970, N. J. S. A. 48:13A-1 *et seq.*

16. There is no reasonable relationship between the protection of the quality of the environment, on the one hand, and an unlimited prohibition against the importation of solid waste which emanated from outside of New Jersey, on the other hand.

17. There is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within the State; and there is no difference with respect to the treatment or disposal of same.

18. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 hereof, if adopted and enforced, would be and constitute an undue burden upon interstate commerce in violation of Art. 1, Sec. 8., Cl. 3 of the United States Constitution.

19. The power to regulate the importation of solid and liquid waste originating or collected in another state has been preempted by the Congress of the United States.

20. Plaintiffs will suffer immediate and irreparable injury, loss or damage if the proposed rule prohibiting the importation of out-of-state waste set forth in paragraph 12 hereof is adopted and enforced.

21. In the event plaintiff landfills are prohibited to dispose of solid waste which originated or was collected outside the territorial limits of this State, the continued operation of said sanitary landfills may be and become economically unfeasible, thereby impairing the public interest.

22. Plaintiffs must obtain equitable relief because they do not have an adequate remedy at law.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT II.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out of state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a taking of private property for public use without just compensation in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT III.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a taking of private property for public use without just compensation in violation of Art. 1, Sec. 20 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on the face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT IV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an impairment of the obligation of contracts in violation of Art. 1, Sec. 10, Cl. 1 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and

successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT V.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an impairment of the obligation of contracts in violation of Art. 4, Sec. 7, Par. 3 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2 in the event the relief prayer for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute a denial of equal protection of the laws in violation of Amendment 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed

N. J. A. C.-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive and 20 through 22 of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. The proposed rule prohibiting the disposal of out-of-state waste set forth in paragraph 12 of the First Count hereof, if adopted, would be and constitute an arbitrary, capricious and unreasonable exercise of power by an administrative agency, thereby denying plaintiffs due process of the law in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from adopting proposed N. J. A. C. 7:26-1.8.1 and proposed N. J. A. C. 7:26-1.8.2.

b. Temporarily and permanently enjoining the enforcement of proposed N. J. A. C. 7:26-1.8.1 and proposed

N. J. A. C. 7:26-1.8.2 in the event the relief prayed for in subparagraph a hereof is not granted and said proposed rules are adopted by the New Jersey Department of Environmental Protection.

c. That this Court declare proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, as same may be adopted, null and void as being unconstitutional on their face or in their application to plaintiffs.

d. That this Court grant costs of suit, and

e. That such other relief be granted by the Court as seems to it just and equitable.

COUNT VIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through 17 inclusive of the First Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. The New Jersey Legislature has conferred sweeping authority upon appropriate public bodies to regulate the treatment and disposal of solid waste in New Jersey, for the purpose of assuring a sanitary method of disposing of solid waste and thereby protecting the public health, safety and welfare.

3. N. J. S. A. 26:1A7 provides, in part, that the Public Health Council, established within the Department of Health of the State of New Jersey, shall have power to establish reasonable sanitary regulations, and that the body of regulations so established shall be called the State Sanitary Code.

4. By virtue of said authority and in accordance with the applicable provisions of the Administrative Procedure Act, N. J. S. A. 52:14B-1 *et seq.*, a revision of Chapter VIII of the State Sanitary Code, exclusively concerned with refuse disposal, was adopted by the Public Health Council to become effective July 1, 1970.

5. Section 6 of the Solid Waste Management Act (1970) N. J. S. A. 13:1E-6b provides, in pertinent part, as follows: "All codes, rules and regulations heretofore adopted by the Public Health Council relating to refuse disposal shall continue in full force and effect and be enforceable by the department (of environmental protection), subject to its power as herein provided to amend or repeal the same."

6. By virtue of the authority granted by the applicable provisions of the Solid Waste Management Act (1970), (N. J. S. A. 13:1E-1 *et seq.*) and the Waste Control Act (N. J. S. A. 13:1I-1 *et seq.*) and in accordance with applicable provisions of the Administrative Procedure Act, N. J. S. A. 52:14B-1 *et seq.*, the Department of Environmental Protection held hearings in two parts during December, 1973 on proposed solid waste management regulations.

7. Said proposed regulations do not expressly amend or repeal Chapter VIII of the State Sanitary Code.

8. In addition to the aforesaid, N. J. S. A. 13:1E-17, being a supplement to the Solid Waste Management Act (1970) provides, in pertinent part, as follows: "No ordinances or regulations of any governing body of a municipality or county or board of health more stringent than this act or any rules or regulations promulgated pursuant hereto, and relating to health and environmental protection aspects of solid waste collection or solid waste disposal, shall be superseded by this act."

9. A similar provision with respect to the provisions of the State Sanitary Code was enacted in 1947, N. J. S. A. 26:1A-9.

10. On January 2, 1974, the Governor of the State of New Jersey approved S. 2367 (P. L. 1973, c. 363) being a supplement to the Waste Control Act, N. J. S. A. 13:1I-1 *et seq.*

11. Said Act, which will become effective February 1, 1974, is entitled as follows:

> An Act to prohibit any person from bringing into this State any solid and liquid waste which originated or was collected outside the State and supplementing the "Waste Control Act," approved February 21, 1973 (P. L. 1973, c. 39).

12. The text of said Act provides as follows:

> (1) The Legislature finds and determines that since the enactment of P. L. 1973, c. 39 (C. 13:11-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.
>
> (2) No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations

> permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act," P. L. 1973. c. 39.

13. In enacting a law prohibiting the importation of out-of-state waste, the principal concern of the New Jersey Legislature was to preserve landfill acres in New Jersey for solid waste generated in this State.

14. There is no qualitative difference between the solid waste which originates or is collected outside the State of New Jersey and that which originates or is collected within this State; and there is no difference with respect to the treatment or disposal of same.

15. There is no reasonable relationship between the protection of the quality of the environment, on the one hand, and the unlimited prohibition against the importation of solid waste which emanated from outside of New Jersey, on the other hand.

16. Inasmuch as the disposal of solid waste is a problem of national scope and concern, the Congress of the United States has directed the Secretary of Health, Education and Welfare to encourage interstate and interlocal cooperation in connection with solid waste disposal problems. 42 U. S. C. A. § 3254.

17. P. L. 1973, c. 363 constitutes an undue burden upon interstate commerce in violation of Art. 1, Sec. 8, Cl. 3 of the United States Constitution.

18. The power to regulate the importation of solid and liquid waste originating or collected in another state has been preempted by the Congress of the United States.

19. Plaintiffs repeat the allegations contained in paragraphs 20 through 22 inclusive of the First Count of the within Complaint and make same a part hereof as if fully set forth herein.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT IX.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive, and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes the taking of private property for public use without just compensation in violation of Amendment 5 and Amendment 14 of the United States Constitution.

WHEREFORE, plaintifis demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT X.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363, constitutes the taking of private property for public use without just compensation in violation of Art. 1, Sec. 20 of the New Jersey Constitution.

WHEREFORE, plaintiffs, demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes an impairment of the obligation of contracts, in violation of Art. 1, Sec. 10, Cl. 1 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes an impairment of the obligation of contract in violation of Art. 4, Sec. 7, par. 3 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. Inasmuch as more than one object is embraced by P. L. 1973, c. 363, said enactment violates Art. 4, Sec. 7, Par. 4 of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. Section 2 of P. L. 1973, c. 363 contains an unconstitutional delegation of legislative power in violation of Amendment 14 of the United States Constitution, and Art. 4, Sec. 1, Par. 1, of the New Jersey Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XV.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is so vague and uncertain as to deny plaintiffs due process of the law in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVI.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is violative of due process of the law as constituting an arbitrary, capricious and unreasonable exercise of power by the Legislature, as provided in Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 is void for failure to provide adequate standards to an administrative agency in violation of Amendments 5 and 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XVIII.

1. Plaintiffs repeat each and every allegation contained in paragraphs one through sixteen inclusive and nineteen of the Eighth Count of the within Complaint, and make same a part hereof as if fully set forth herein.

2. P. L. 1973, c. 363 constitutes a denial of equal protection of the laws in violation of Amendment 14 of the United States Constitution.

WHEREFORE, plaintiffs demand judgment:

a. Temporarily and permanently enjoining defendants and their deputies, agents, employees, servants and successors in office from enforcing P. L. 1973, c. 363; and

b. That this Court declare P. L. 1973, c. 363 null and void as being unconstitutional on its face or in its application to plaintiffs.

c. That this Court grant costs of suit; and

d. That such other relief be granted by the Court as seems to it just and equitable.

COUNT XIX.

1. N. J. S. A. 13:1I-4a provides as follows:

> The commissioner shall have the power to formulate and promulgate, amend and repeal orders, rules and regulations prohibiting, conditioning and controlling the incineration or landfill of solid waste and the treatment or disposal of liquid wastes within the State which originated or were collected outside the territorial limits of the State.

2. The power to prohibit, as distinguished from the power to regulate, the incineration or landfill of solid waste and the treatment or disposal of liquid waste has been preempted by the federal government.

WHEREFORE, plaintiffs demand judgment:

a. Declaring the grant of power to prohibit the treatment or disposal of solid and liquid waste contained in N. J. S. A. 13:1I-4a unconstitutional.

b. That this Court grant costs of suit; and

c. That such other relief be granted by the Court as seems to it just and equitable.

Jamieson, Walsh, McCardell, Moore & Peskin
A Professional Corporation
By /s/ HERBERT F. MOORE
Herbert F. Moore

Affidavit of Richard A. Peluso, Dated January 16, 1974.

A Professional Corporation
JAMIESON, WALSH, MCCARDELL, MOORE AND PESKIN
One West State Street
Trenton, N. J. 08608
(609) 396-5511

Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION
CIVIL ACTION

City of Philadelphia, a municipal corp. of the Commonwealth of Pa., City of Glen Cove a municipal corp. of the State of N. Y., Landfill and Development Company, a N. J. corp., M. A. C. Landfill, Inc., a N. J. corp. & DeLorenzo-Interstate Waste Removal Co., Inc., a N. J. corp.,

Plaintiffs

v.

State of New Jersey, Department of Environmental Protection of the State of New Jersey, and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

AFFIDAVIT

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed almost all course work toward a doctor's degree in said field.

3. The transportation in New Jersey of solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health, welfare or safety of the residents of the State of New Jersey.

4. The treatment and disposal in New Jersey of domestic or foreign solid waste in accordance with the terms and provisions of applicable Federal and New Jersey state and administrative laws, rules and regulations is not hazardous to the public health and does not constitute a threat to the health; welfare or safety of the residents of the State of New Jersey.

5. As a general rule, there is a direct relationship between the length of time consumed in bringing a sanitary landfill to final grade including placement of the final impermeable cover thereon, and the potential for environmental pollution.

6. If the effect of P. L. 1973, c. 363, or proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 is to reduce the volume of solid waste treated and disposed of in New

Jersey and thereby extend the time within which landfills are brought to final grade and final cover then such statute and proposed rules may have the effect of increasing, rather than decreasing such danger as may exist to the quality of the environment.

7. In the event the court would grant restraints enjoining the enforcement of P. L. 1973, c. 363, or the adoption or enforcement of proposed N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2, the public health, welfare and safety would no no way be jeopardized provided said waste continued to be treated and disposed of in accordance with the terms of applicable Federal and New Jersey state and administrative laws, rules and regulations.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and Subscribed before me this 16th day of January, 1974.

HERBERT F. MOORE
Herbert F. Moore
Attorney at Law of New Jersey

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
TRENTON

WILLIAM T. CAHILL
Governor

Counsel to the Governor
RICHARD W. DEKORTE

December 26, 1973

David Quient, Esq.
City Attorney
City Hall
Glen Cove, New York 11542

Re: Jamaica Ash & Rubbish Removal Co. Inc.

Dear Mr. Quient:

Governor Cahill has asked me to reply to your letter of December 18, 1973 with respect to the letter of December 11, 1973 addressed to the Governor from the firm of Rosenberg, Rosenberg & Rockman. The subject matter of that letter apparently refers to Senate Bill No. 2367 (OCR), currently before the Governor for his review. Enclosed is a copy of that bill for your information.

This bill grants to the Commissioner of Environmental Protection the power to promulgate regulations to permit certain types of solid and liquid waste to be disposed of in the State of New Jersey. May I suggest, therefore, that you review the regulations of the Department, both promulgated and pending, to determine the status of the rubbish removal program of the City of Glen Cove.

Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of

New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination.

Very truly yours,

RICHARD W. DEKORTE
Counsel to the Governor

Encl.

cc: Richard J. Sullivan, Commisioner
Dept. of Environmental Protection
Rosenberg, Rosenberg & Rockman

JAMIESON, WALSH McCARDELL,
MOORE and PESKIN
A PROFESSIONAL CORPORATION
One West State Street
Trenton, N. J. 08608
(609) 396-5511
Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION
Docket No. L-15068-73 P. W.
CIVIL ACTION

CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa., CITY OF GLEN COVE, a municipal corp. of the State of N. Y., LANDFILL and DEVELOPMENT COMPANY, a N. J. corp., MAC SANITARY LANDFILL, INC., a N. J. corp., KINSLEY'S LANDFILL, INC., a N. J. corp. & DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corp.,

Plaintiffs

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS.

This matter being opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Cor-

poration, by Arthur Meisel, Esquire, attorneys of the plaintiffs, notice having been informally given to the Office of the Attorney General of New Jersey, and it appearing to the Court from the duly verified complaint and the affidavits annexed thereto that immediate and irreparable damage will probably result to the plaintiffs before a hearing can be had on an application for a temporary restraining order in this action:

It is on this 21st day of January, 1974,

ORDERED, that the defendants show cause before the Superior Court, Law Division, at the Mercer County Court House, South Broad and Market Streets, Trenton, N. J. on the 1st day of February, 1974 at 1:30 o'clock in the afternoon or as soon thereafter as counsel can be heard why an injunctive order should not be issued restraining and enjoining the defendants according to the demand of the complaint until the final hearing of this action.

IT IS FURTHER ORDERED, that the defendant, Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey and the said Department of Environmental Protection shall desist and refrain from adopting sections 7:26-1.8.1 and 7:26-1.8.2 of the proposed Revision to the Rules of the Bureau of Solid Waste Management and that the State of New Jersey desist and refrain from enforcing the provisions of P. L. 1973, c. 363 until the constitutionality of same has been determined, and that said restraints apply to defendants and their agents, employees, servants and attorneys.

IT IS FURTHER ORDERED, that the defendants have leave to move for a dissolution or modification of the restraints hereby imposed on 2 days notice to the plaintiffs.

IT IS FURTHER ORDERED, that true but uncertified copies of the complaint and the affidavits attached thereto and of this order be served upon the defendants within 2 days from the date hereof.

GEORGE Y. SCHOCH

J. S. C.

Filed February 5, 1974

JAMIESON, WALSH, MCCARDELL, MOORE AND PESKIN
A Professional Corporation
One West State Street
Trenton, N. J. 08608
(609) 396-5511
Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION
Docket No. L-15068-73 P. W.

CIVIL ACTION
CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al.,
Defendants.

ORDER GRANTING INTERLOCUTORY INJUNCTION.

This matter being opened to the Court by Jamieson, Walsh, McCardell, Moore and Peskin, a Professional Corporation, by Herbert F. Moore, Esq., attorneys for plaintiffs, and in the presence of Joseph M. Clayton, Jr., Deputy Attorney General of the State of New Jersey, attorney for defendants, and the Court having considered the complaint and affidavits attached thereto and the answer filed on behalf of the defendants, and having heard the arguments of the respective counsel, and being satisfied that the plaintiffs are entitled to an order restraining defendants as demanded.

And it appearing that the Order to Show Cause made on the 25th day of January, 1974 has been duly served as therein directed,

It is on this 1st day of Febr., 1974,

ORDERED, that the State of New Jersey shall desist and refrain from enforcing the provisions of P. L. 1973, c. 363;

IT IS FURTHER ORDERED, that Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey and the said Department of Environmental Protection shall desist and refrain from adopting Sections 7:26-1.8.1 and 7:26-1.8.2 of the proposed Revision to the Rules of the Bureau of Solid Waste Management;

IT IS FURTHER ORDERED, that the said Commissioner and Department shall desist and refrain from enforcing N. J. A. C. 7:1-4;

IT IS FURTHER ORDERED, that the said Commissioner and Department shall desist and refrain from adopting any rule or administrative order, of any nature or descripiton, which would prohibit the treatment or disposal in New Jersey of solid waste collected or originating in another state, or which would prohibit transportation of such waste into this state for disposal purposes;

IT IS FURTHER ORDERED, that the restraints contained herein shall apply to the aforesaid defendants and their agents, employees, servants and attorneys until the further order of this Court.

/s/ GEORGE Y. SCHOCH
George Y. Schoch, A. J. S. C.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION

CIVIL ACTION

City of Philadelphia, a municipal corp. of the Commonwealth of Pa., City of Glen Cove, a municipal corp. of the State of N. Y., Landfill and Development Company, a N. J. corp., M. A. C. Landfill, Inc., a N. J. corp., Kinsley's Landfill, Inc., a N. J. corp. & DeLorenzo-Interstate Waste Removal Co., Inc., a N. J. corp.,

Plaintiffs

v.

State of New Jersey, Department of Environmental Protection of the State of New Jersey, and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Defendants.

AFFIDAVIT.

DISTRICT OF COLUMBIA } *ss.:*

ARSEN J. DARNAY, of full age, being duly sworn according to law, deposes and says:

1. I am the Deputy Assistant Administrator for Solid Waste Management Programs, Environmental Protection Agency.

2. The statements on the attached letter to Mr. Herbert F. Moore dated January 29, 1974 are all true to my personal knowledge.

ARSEN J. DARNAY
Arsen J. Darnay

Sworn to and Subscribed before me this 29 day of January, 1974.

A. BLAKEMAN EARLY
A. Blakeman Early
Attorney at Law of the District of Columbia

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D. C. 20460

Mr. Herbert F. Moore, Esq.
Jamieson, Walsh, McCardell, Moore and Peskin
One West State Street
Trenton, New Jersey 08608

Dear Mr. Moore:

In connection with current litigation in which you are engaged with the State of New Jersey, you have requested a statement of this Agency's position on the legislative action by the State of New Jersey which will prohibit as of February 1, 1974, the importation into the State of any solid or liquid waste originating or collected outside the State. I understand also that the State has adopted under its emergency procedures implementing regulations which with some narrow exceptions, will ban importation for land disposal of any such waste. Thus, it would appear that the treatment and disposal within New Jersey of most wastes generated outside the State will be illegal and subject to severe enforcement penalties as of February 1, 1974.

It has not been established to the satisfaction of EPA that the continuation of disposal, in an environmentally sound manner, of solid waste generated outside New Jersey poses any greater immediate health threat to its citizens than the continued disposal of domestically generated solid waste. Therefore, there appears to be no immediate health threat to justify the precipitious passage and implementation of this statute and these regulations.

If this statute and implementing regulations are allowed to become effective February 1, the City of Philadelphia would significantly increase and continue the incineration of its solid waste. The incineration of such quantities of solid waste would result in the emission of particulate matter in violation of health related air quality standards and the Clean Air Act of 1970. (See Affidavit of Mr. David J. Damiano, Commissioner of Streets, City of Philadelphia, page 3.)

Representatives of EPA have testified on two occasions on other proposals to ban the importation and disposal in New Jersey of out-of-state wastes. Copies of the statements of Meyer Scolnick before the Hackensack Meadowlands Development Commission on June 18, 1973, and of John A. Ruf before the New Jersey Department of Environmental Protection on December 13, 1973, are enclosed. These statements, together with this letter, represent the position of the Environmental Protection Agency. Copies will be distributed to the State and to others who have expressed an interest in this matter.

In brief, EPA's position is that a State importation ban such as that enacted by New Jersey is in conflict with the national policy set forth in Section 206 of the Solid Waste Disposal Act, the administration of which law is an EPA responsibility. The EPA Administrator is charged with encouraging (1) cooperative activities by the States and local governments in connection with solid waste disposal programs; (2) interstate, inter-local, and regional planning for, and the conduct of, interstate, inter-local and regional waste disposal programs; and (3) the enactment of improved and, so far as practical, uniform state and local laws governing solid waste disposal. The New Jersey legislation will work at cross purposes with the plans and goals EPA is striving to implement under the role given to it by the Solid Waste Disposal Act. Moreover, the continuation of such a restriction would establish an unfavorable precedent which, if followed by a substantial number

of other States, would render regional and interstate solutions to solid waste disposal problems impossible to attain.

While the concerns of the several States as to the growing scarcity of landfill disposal sites are understandable, restrictions on out-of-state wastes reflect a narrow, parochial view without due regard to more significant problems and values involved in the national policy in favor of regional planning for solid waste disposal consistent with the achievement of environmental quality goals on a regional basis in this and the related environmental areas in which EPA is making efforts to combat water pollution under the Federal Water Pollution Control Act Amendments of 1972 and air pollution under the Clean Air Act. Environmental planning in the opinion of this Agency means regional planning and not restrictive legislation by a jurisdictional entity in its own short-range self interest. This means that solid waste processing and disposal facilities should be planned, designed and constructed so as to serve "waste sheds" which may encompass more than one city or State, and not merely the jurisdictional entity in which it is located or in which the waste is generated.

The foregoing is not to say that appropriate standards should not be applied in the areas of treatment and disposal of solid wastes and of land use planning. We strongly favor the adoption of standards applicable to domestic and imported solid wastes so that they apply on an equal basis with out-of-state waste subject to the same statutory and regulatory treatment as domestic waste.

The control of available landfill sites development in light of land use planning as reflected in State laws, regulations and policies in such areas as "wetlands" preservation, area development (such as in the Hackensack Meadowlands), open-space, recreational, agricultural and park area designations and zoning and growth development planning are admirable efforts of environmental control provided such efforts take into account the total environmental picture and address the significant problems of air quality, water quality, waste water treatment as well as solid waste treatment and disposal. A single thrust to ban out-of-state wastes impedes rather than enhances environmental quality.

In conclusion, it is EPA policy that no municipality or State should take action to prevent the free flow of waste across municipal or state boundaries provided the transport, processing, and disposition of the waste is in accordance with the provisions of applicable federal and state environmental and land use laws, guidelines, regulations, and recognized engineering practices.

Sincerely yours,

ARSEN J. DARNAY
Arsen J. Darnay
Deputy Assistant Administrator
for Solid Waste Management Programs
(HM-562)

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
State House Annex
Trenton, New Jersey 08625

By: Joseph M. Clayton, Jr.
Deputy Attorney General
(609) 292-6597

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY
Docket No. L-15068-73 P. W.
Civil Action

CITY OF PHILADELPHIA, etc. et al,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al,
Defendants.

ANSWER

Defendants, by way of answer to the complaint in the above captioned matter, say:

COUNT 1.

1. The allegations contained in Paragraphs 1 through 6 of the First Count of the Complaint are admitted.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the First Count of the Complaint.

3. The Solid Waste Management Act referred to in Paragraph 8 of the First Count of the Complaint speaks for itself.

4. The allegations contained in Paragraph 9 of the First Count of the Complaint are admitted.

5. With respect to the allegations contained in Paragraphs 10 and 11 of the First Count of the Complaint, the Waste Control Act (L. 1973, c. 39) speaks for itself.

6. Defendants admit the allegations contained in Paragraphs 12, 13 and 14 of the First Count of the Complaint; however, said regulations (N. J. A. C. 7:26-1.8.1 and 1.8.2) have been superseded by L. 1973, c. 363, and said regulations will not be adopted by the Department.

7. The Solid Waste Utility Control Act referred to in Paragraph 15 of the First Count of the Complaint speaks for itself.

8. The allegations contained in Paragraph 16 of the First Count of the Complaint are denied.

9. The allegations contained in Paragraph 17 of the First Count of the Complaint are admitted.

10. The allegations contained in Paragraph 18 of the First Count of the Complaint are denied.

11. The allegations contained in Paragraph 19 of the First Count of the Complaint are denied.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of the First Count of the Complaint.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21 of the First Count of the Complaint.

14. The allegations contained in Paragraph 22 of the First Count of the Complaint are denied.

COUNT 2.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Second Count of the Complaint are denied.

COUNT 3.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Third Count of the Complaint are denied.

COUNT 4.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fourth Count of the Complaint are denied.

COUNT 5.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fifth Count of the Complaint ar denied.

COUNT 6.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Sixth Count of the Complaint are denied.

COUNT 7.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Seventh Count of the Complaint are denied.

COUNT 8.

1. Defendants repeat their answer to the First Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraphs 2 through 12 of the Eighth Count of the Complaint are admitted, except that the various laws of the State of New Jersey referred to in said allegations speak for themselves.

3. Defendants admit that the preservation of additional landfill acres for solid waste generated in New Jersey was one of the reasons for the enactment of a ban on the disposal in New Jersey of waste originating outside the State.

4. The allegations contained in Paragraph 14 of the Eighth Count of the Complaint are admitted.

5. The allegations contained in Paragraph 15 of the Eighth Count of the Complaint are denied.

6. The laws of the United States, specifically 42 U. S. C. § 3254, speak for themselves.

7. The allegations contained in Paragraph 17 of the Eighth Count of the Complaint are denied.

8. The allegations contained in Paragraph 18 of the Eighth Count of the Complaint are denied.

9. Defendants repeat their answers to the allegations contained in Paragraphs 20 through 22 of the First Count of the Complaint and incorporate same herein by reference.

COUNT 9.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Ninth Count of the Complaint are denied.

COUNT 10.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Tenth Count of the Complaint are denied.

COUNT 11.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Eleventh Count of the Complaint are denied.

COUNT 12.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Twelfth Count of the Complaint are denied.

COUNT 13.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Thirteenth Count of the Complaint are denied.

COUNT 14.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fourteenth Count of the Complaint are denied.

COUNT 15.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Fifteenth Count of the Complaint are denied.

COUNT 16.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Sixteenth Count of the Complaint are denied.

COUNT 17.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Seventeenth Count of the Complant are denied.

COUNT 18.

1. Defendants repeat their answers to the Eighth Count of the Complaint and incorporate same herein by reference.

2. The allegations contained in Paragraph 2 of the Eighteenth Count of the Complaint are denied.

COUNT 19.

1. N. J. S. A. 13:1I-4(a) speaks for itself.

2. The allegations contained in Paragraph 2 of the Nineteenth Count of the Complaint are denied.

FIRST SEPARATE DEFENSE.

The complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE.

To the extent that the complaint constitutes a challenge to the administrative regulations adopted by the Department of Environmental Protection, the Superior Court, Law Division, lacks jurisdiction over the subject matter thereof.

THIRD SEPARATE DEFENSE.

The enactment of L. 1973, c. 363 has superseded the proposed regulations referred to in the complaint as

N. J. A. C. 7:26-1.8.1 and 1.8.2. The Department has indicated its intent to not adopt those proposed regulations. Thus the allegations with respect to those regulations are moot.

FOURTH SEPARATE DEFENSE.

Plaintiffs have failed to exhaust their administrative remedies.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
JOSEPH M. CLAYTON, JR.
Joseph M. Clayton, Jr.
Deputy Attorney General

I hereby certify that the within pleading has been served within the time prescribed by Rule 4:6.

JOSEPH M. CLAYTON, JR.
Joseph M. Clayton, Jr.
Deputy Attorney General

Pereira Deposition, Dated March 13, 1974.

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particular site Joe Miller has all the ground water data and he is in the ground water section.

When it comes to a ground water, the formation, the location and so on and so forth, they turn to me.

Then, of course, Dr. Kemball Widmer, who is our Chief, as in all offices where the brass is concerned, he would have the ultimate say.

Mr. Meisel: That is all I have.

• • •

LINO F. PEREIRA, sworn.

DIRECT EXAMINATION.

By Mr. Meisel:

Q. Mr. Pereira, I am going to ask you a series of questions.

The purpose of the questions is to in no way trick you but simply to elicit answers to the questions that are asked.

If you do not understand a question at any time or if the question needs to be rephrased for you to understand it, please ask me and I will do so.

A. Right.

Q. Could you please state your place of employment.

A. I work for the New Jersey Department of Environmental Protection, the Bureau of Solid Waste Management

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in the Division of Environmental Qu. lity.

Q. What is your position in that Bureau?

A. I am principal environmental engineer with that Bureau.

Q. How long have you served in that capacity?

A. For approximately 10 months.

Q. Were you employed by the State of New Jersey prior to that time?

A. Yes. I have been employed by the State and specifically the Bureau of Solid Waste Management since early June of 1970.

Q. In what capacity were you employed prior to being employed as principal engineer?

A. For the first year of my employment I was employed with the title of Chemical Engineer Trainee.

For the subsequent year I was employed as an Assistant Environmental Engineer.

For approximately 11 months thereafter I was employed as a senior environmental engineer and since that time I have held the title of Principal Environmental Engineer.

Q. Were you employed for any other concern prior to coming with the State?

A. Not on a full-time basis, that is, not other than summer work and part-time work while I was in college.

Q. When did you graduate from college?

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A. In 1970.

Q. With what degree?

A. Bachelor of Science in Chemical Engineering.

Q. Do you hold any license issued by the State of New Jersey?

A. Not any license, not as a licensed professional engineer although I am registered with the Board of Professional Engineers under Title 45 as an engineer in training, which is a prerequisite for obtaining a license as a professional engineer.

Q. I notice that you have obtained a BS in Chemical Engineering.

Did you have any specific course work concerning sanitary engineering?

A. None specifically concerning sanitary engineering although a number of the courses one is required to take for chemical engineering are also required by sanitary engineering.

Q. Are you familiar with Public Law 1973 Chapter 363 passed by the State of New Jersey, being an act to prohibit any person from bringing into this state any solid and liquid waste which originated or was collected outside the state and supplementing the Waste Control Act approved February 21, 1973?

A. Yes, I am.

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department are based largely upon the state of the art at this time and not upon the threat or not necessarily upon the threat to the health, safety and welfare.

Q. I would request that the last question that I asked be answered with a Yes or No because your response did not answer that question.

Mr. Meisel: Read it back, please.

(The reporter read the pending question.)

Mr. First: If you can answer that Yes or No, go ahead.

A. It is a rather difficult question to answer.

Q. The standards either are or are not adequate. It seems to me that it can be answered Yes or No.

A. My answer would be as they are now promulgated they are not adequate, in my opinion.

Q. Are the standards as proposed in the proposed rules of the Bureau of Solid Waste Management adequate

to protect the public health, safety and welfare or the quality of the environment?

A. Only insofar as those standards are met by the operation.

Q. All right. So if they are met is your answer Yes?

A. My answer is Yes but it is qualified to the extent that sometimes it is not feasible or possible to men-

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know about.

Q. How does the Department of Environmental Protection compute the life expectancy of a particular landfill site?

A. The only method or the method that the department has used and does use in computing the life expectancy of a sanitary landfill site utilizes the information submitted with the engineering design, that information being the life expectancy of the site as calculated by the design engineer and the tonnage received at the site per week.

The calculation by the department assumes that the tonnage will remain constant and that the engineer calculated his life expectancy on that constant tonnage and the calculation involves taking the tons per week—well, I can probably stop here and say that for any particular site the life expectancy is given to us in the engineering design by the licensed professional engineer who provided it and it is assumed that he does so based on current tonnages or expected tonnages at the site.

Q. Let us suppose that it is a 200-acre site, that the site is uniform throughout and as a result there are no special problems, the entire site is useful, that 10,000 tons per week is brought to that site, that the site will be built

up by 50 feet, that one is using the usual six inches of daily cover and 2 feet of final cover, what would

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the anticipated life expectancy of that site be, utilizing the best compaction methods available in the state of the art?

A. We are speaking about a 200-acre site by 50 feet in depth, uniformly 50 feet across the entire thing?

Q. That is correct.

A. And you were asking for the maximum amount of solid waste that can be placed therein?

Q. I am asking for the anticipated life expectancy of the site.

A. Could you give me the rate at which tonnage is brought in again?

Q. 10,000 tons per week.

A. Are we pre-supposing here that the operator utilizes the space to the maximum by under existing standards creating each lift as high as is permitted under existing standards?

Q. Yes, we are.

A. Are you asking me to calculate it or do you want to know how we would calculate it?

Q. I am asking you to calculate it.

A. My calculations bring this to over 12 years or 12.4 years in fact, assuming that one-fifth of the volume is consumed by soil cover.

Q. What is the expected or anticipated life

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expectancy of landfills presently existing in the State of New Jersey?

A. That is very difficult to calculate because of a number of factors.

Our best estimate is that the existing landfills in the state have no more than 10 years of life.

Q. Would the life expectancy of existing landfills be increased by using a variety of processing alternatives to reduce weight and/or volume of solid waste?

A. Yes, I believe so.

Q. Has there been any estimate as to how long that life expectancy would be extended by using such processing alternatives?

A. No, there hasn't been any estimate to my knowledge.

Q. Has there been any estimate as to the availability of additional acreage in the State of New Jersey for sanitary landfill purposes?

A. No estimate has been made but noting the establishment of new sanitary landfills, the rate of that establishment is low compared to the frequency with which landfills cease to exist in this state.

Q. Can new sanitary landfills be established in the State of New Jersey?

A. Yes, I believe they can be established.

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Q. You indicated earlier that certain kinds of land may be more suitable other than kinds of land for sanitary landfill purposes.

A. That's correct.

Q. Is there any estimate as to the number of acres of the most suitable land for sanitary landfill purposes which presently exists in the State of New Jersey?

A. I find that a very difficult question to answer because, first, it speaks to the relative suitability of one piece of land over another piece of land for the use of sanitary landfill.

If one defines one's standards stringently enough, I suppose it is possible to end up with very little square feet of land that is entirely suitable.

Q. Under existing standards in the State of New Jersey which could not be used for sanitary landfill purposes?

A. Yes.

Q. What kind of land could not be used?

A. Lands which are, for instance, protected in their natural state as are flood plains, wetlands, various tidal lands existent in the state as well as, of course, other restrictions such as local land use requirements so far as they apply to sanitary landfill sites.

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Q. I am not speaking to whatever local land use requirements there might be.

A. You are speaking only of environmental considerations?

Q. Approximately how many acres would you calculate there are involved in the kinds of land you suggested would be absolutely unsuitable or unusable for sanitary landfill purposes?

A. I don't know.

Q. Does it represent a substantial portion of the land of the State of New Jersey in terms of the total land area of the state or does it represent an insubstantial total land area taken the total land area of the state?

A. Again I don't know because I don't deal specifically with those lands.

I can only answer that in my experience with the review of designs and the approval of existing facilities in the state that a substantial portion of the existing facilities, sanitary landfills in the state does now or did consist of those lands.

Q. Who is responsibile for working in those areas?

A. The Wetlands Act is administered specifically by the Wetlands Section in the Division of Marine Services in the Department of Environmental Protection.

The flood plain reqirements are administered speci-

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Q. Is it the volume of solid waste which causes a threat?

A. Yes, in terms of its tonnage, the actual quantity of waste, the degree of threat is directly proportionate to the tonnage of waste disposed.

Q. If there was less tonnage would the threat or could the threat be diminished to a point where it would not pose a substantial or material threat?

A. I suppose it could but I could not possibly put my finger on the tonnage that would not pose a substantial or material threat.

It may only be one ton. I don't know.

Q. Can New Jersey dispose of all or a portion of its solid waste outside the State of New Jersey?

A. Can it do so?

Q. Yes.

Mr. First: You mean can the people of the state?

Mr. Meisel: Yes.

A. As far as I know under existing legislation it can be done. It is possible.

Q. Are there instances in which communities in New Jersey dispose of all or a portion of the solid or liquid waste originating in those municipalities outside of the State of New Jersey?

[113]

A. There have been instances in the past and even in the recent past, if one considers 1971 the recent past. I am not familiar with the communities or the quantities after 1971.

Q. Does the City of Phillipsburg dispose of substantially all its solid waste outside the State of New Jersey?

A. It did in the calendar year 1971 as far as I know.

Q. Are there sanitary landfill facilities outside of the State of New Jersey which accept solid waste which originates inside of the State of New Jersey?

A. I don't know if there are sanitary landfill facilities.

Our records merely indicate that in the Calendar year 1971 some wastes were exported from the state to disposal sites outside the state.

Q. Has the Department of Environmental Protection explored the question as to whether a greater percentage than now exists of solid waste originating in New Jersey can be disposed of outside the State of New Jersey?

A. You mean by that have we contemplated sending more out?

Q. No. I am asking if you have looked into alternatives, whether there are facilities to which you could

[114]

send solid waste originating in New Jersey which exist outside the State of New Jersey.

A. I can think of no effort on our part to look into that at all.

Our planning for Solid Waste Management has assumed that New Jersey will bear the responsibility for its own wastes.

The planning has gone on accordingly.

Mr. Meisel: I think we can break for the day.

• • •

Filed March 21, 1974

JAMIESON, WALSH, McCARDELL, MOORE
AND PESKIN,
a Professional Corporation
One West State Street
Trenton, N. J. 08608
(609) 396-5511
Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION

Docket No. L-15068-73 P. W.

Civil Action

CITY OF PHILADELPHIA, etc., et al
Plaintiffs

v.

STATE OF NEW JERSEY, etc., et al
Defendants

NOTICE OF MOTION

TO: WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants
State House Annex
Trenton, New Jersey 08625

SIR:

Please take notice that the undersigned, attorneys for plaintiffs, will apply to the Superior Court of New Jersey,

Mercer County Court House, Trenton, New Jersey on Friday, March 22, 1974 at 9:00 A. M. or as soon thereafter as counsel may be heard, for summary judgment in favor of plaintiffs only upon the issues of federal preemption and discrimination against interstate commerce in violation of Art. 1, Sec. 8, cl. 3 of the United States Constitution; and plaintiffs will make further application for an order to set the date of hearing on the merits of the matter, if such hearing is necessary, on Monday, April 15, 1974, or upon such other day as may be ordered by the court and not on Monday, March 25, 1974 as presently scheduled.

On or before Monday, March 18, 1974, there will be served upon defendants the documents upon which plaintiffs will rely at the hearing on this motion.

JAMIESON, WALSH, MCCARDELL, MOORE
and PESKIN
A Professional Corporation

by: ARTHUR MEISEL
Arthur Meisel

Dated: March 14, 1974

PORTION OF BRIEF FILED IN TRIAL COURT BY APPELLEES.

It is thus evident that the court must consider *"all the relevant facts and circumstances."* At this stage of the litigation *sub judice* the Court has not had an opportunity to consider any of the relevant facts and circumstances except for affidavits submitted in favor of and in opposition to the issuance of *ad interim restraints.* The Supreme Court has stressed that:

> *". . . state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment.* Terminal R. Asso. v. Brotherhood of R. Trainmen, supra (318 U. S. 8, 87 L. ed. 578, 63 S. Ct. 420); Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 S. Ct. 594.
>
> • • •
>
> "Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and *whether the relative weights of the state and national interests involved are such as to make inapplicable the rule. . ." Southern Pacific Co. v. Arizona,* 325 U. S. 761, 770, 89 L. Ed. 1915, 1925, 65 S. Ct. 1515 (1944) (emphasis added).

Among those proofs which the court must consider are: the nature and extent of the dangers to the health, safety, welfare and environment of New Jersey presented by the disposal of wastes in New Jersey; the nature and extent of the solid waste crisis in New Jersey; the rapid exhaustion of landfill life in New Jersey; the volume of out-of-state waste being disposed of in New Jersey; the severe limiting effects on the future development of property which has been used for sanitary landfill purposes; the extent of the affect on interstate commerce.

• • •

WILLIAM F. HYLAND
Attorney General Of New Jersey
Attorney for Defendants-Appellants
State House Annex
Trenton, New Jersey 08625

By: MARK L. FIRST
Deputy Attorney General
(609) 292-4997

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY

DOCKET No. L-15068-73 P. W.

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, etc., et al.,
Defendants-Appellants.

NOTICE OF APPEAL

To: CLERK OF THE COURT
HONORABLE GEORGE Y. SCHOCH
Judge, Superior Court of New Jersey
Mercer County Court House
Trenton, New Jersey 08607

HERBERT F. MOORE, ESQ.
Jamieson, Walsh, McCardell, Moore and Peskin, Esqs.
One West State Street
Trenton, New Jersey 08608

VINCENT DOTOLI, ESQ.
Interstate 287 and McKinley Street
South Plainfield, New Jersey 07080

SIRS:

NOTICE IS HEREBY GIVEN that all defendants, State of New Jersey, Department of Environmental Protection of the State of New Jersey and Richard J. Sullivan, Commissioner of the Department of Environmental Protection of the State of New Jersey, appeal to the Superior Court of New Jersey, Appellate Division, from the final judgment of the Superior Court, Law Division, Mercer County, entered on March 26, 1974, by the Honorable George Y. Schoch, declaring P. L. 1973, c. 363 unconstitutional as violative of Article I, Section 8, Clause 3 of the Constitution of the United States in favor of plaintiffs, City of Philadelphia, Pennsylvania, City of Glen Cove, Long Island, New York, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants

By: MARK L. FIRST
Mark L. First
Deputy Attorney General

DATED: April 19, 1974

I hereby certify that there was no testimony taken in the above case. The matter was decided on summary judgment.

MARK L. FIRST
Mark L. First
Deputy Attorney General

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants
State House Annex
Trenton, New Jersey 08625

By: MARK L. FIRST
Deputy Attorney General
(609) 292-4997

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-2202-73

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et als.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, etc., et al.,
Defendants-Appellants.

MOTION FOR STAY PENDING APPEAL.

To: CLERK OF THE COURTS

ARTHUR MEISEL, ESQ.
Jamieson, Walsh, McCardell, Moore and Peskin, Esqs.
Attorney for Plaintiffs-Appellants
1 West State Street
Trenton, New Jersey 08608

VINCENT DOTOLI, ESQ.
Attorney for Plaintiffs-Intervenors-Appellants
Interstate 287 and McKinley Street
South Plainfield, New Jersey

SIRS:

PLEASE TAKE NOTICE that the undersigned, attorney for defendants-appellants, hereby moves the Superior Court of New Jersey, Appellate Division, for an order staying the judgment entered by the Superior Court of New Jersey. Law Division, Mercer County (Schoch A. J. S. C.) on March 27, 1974.

In support of the within motion, the defendants-appellants will rely on the brief and affidavits submitted herewith and the brief and appendix submitted on July 9, 1974.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Defendants-Appellants

By: MARK L. FIRST
Deputy Attorney General

DATED: July 26, 1974

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-2202-73
Motion No. M-1978-73
Before Part P

Judges: HANDLER, MEANOR, CRANE

CITY OF PHILADELPHIA, etc., et als

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et als

v.

STATE OF NEW JERSEY, et al.

Moving Papers Filed:	July 26, 1974
Answering Papers Filed:	August 8 & 9, 1974
Date Submitted to Court:	August 12, 1974
Date Argued:	
Date Decided:	August 14, 1974

ORDER

This matter having been duly presented to the Court, it is hereby ordered as follows:

	GRANTED	DENIED	OTHER
MOTION FOR STAY		X	X

SUPPLEMENTAL:

The appeal shall be accelerated.

FOR THE COURT:

ALAN B. HANDLER
P. J. A. D.

I hereby certify that the forgoing is a true copy of the original on file in my office.

ELIZABETH MCLAUGHLIN
Clerk

WITNESS, THE HONORABLE ALAN B. HANDLER, PRESIDING JUDGE OF PART P, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, this 14th day of August, 1974.

ELIZABETH MCLAUGHLIN
Clerk of the Appellate Division

EXCERPTS FROM BRIEF OF APPELLANTS, STATE OF NEW JERSEY, FILED IN THE APPELLATE DIVISION.

(Pages 17-18.)

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• • •

Similarly, the State of New Jersey does not recognize solid waste for disposal as a legitimate item of commerce. As did Indiana with dead horses, New Jersey only allows solid waste to be handled by those who are licensed and regulated under the concurrent jurisdiction of the Public Utilities Commission and the Department of Environmental Protection. N. J. S. A. 48:2-13; N. J. S. A. 48:13A-1, et seq.; N. J. S. A. 13:1E-1, et seq. The license and regulatory scheme is broad and pervasive and is designed to insure that the public health and environment are properly protected against this deleterious

[18]

substance. Surely, the above statutes clearly demonstrate that the State of New Jersey has not recognized waste as a legitimate item of commerce. Thus, P. L. 1973, C. 363 is consistent with, and not repugnant to, the rationale of the "natural gas" cases.

• • •

SUPREME COURT OF NEW JERSEY
#10927 September Term 1974

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

Pursuant to Rule 2:12-1 it is ORDERED that the appeal from the judgment entered in this cause on March 25, 1974 in the Superior Court, Chancery Division, now pending in the Superior Court, Appellate Division (A-2202-73); be certified directly to this Court for review by this Court; and it is further

ORDERED that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

ORDERED that all papers to be filed by the parties in the prosecution of this appeal shall be filed by the Clerk of this Court without payment of fees for such filing; and it is further

ORDERED that this matter be consolidated with Hackensack Meadowlands Development Commission and State

of New Jersey v. Municipal Sanitary Landfill Authority, et al and City of Yonkers, New York (A-1592-73).

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton on this 7th day of October, 1974.

FLORENCE R. PESKOE
Clerk

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, N. J. 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

ORDER GRANTING STAY AND CONTINUING INJUNCTIVE RELIEF.

This matter being opened to the court by Jamieson, McCardell, Moore, Peskin and Spicer, a Professional Corporation, attorneys for plaintiffs-respondents, Herbert F. Moore, Esq. appearing in the presence of Assistant Attorney General Stephen L. Skillman, attorney for defendants-appellants for an order temporarily staying the judgment of the Supreme Court of New Jersey in the above cap-

tioned matter and temporarily continuing the injunctive order heretofore entered by the Superior Court of New Jersey, Law Division, in connection therewith, and good cause being shown,

It is on this 20th day of November, 1975,

ORDERED, that the judgment of this court heretofore entered in this action on November 18, 1975 against plaintiffs-respondents be and hereby is temporarily stayed and that the injunctive order heretofore issued in connection with this case is hereby temporarily extended until further order of the court; and it is

FURTHER ORDERED, that plaintiffs-respondents shall file a memorandum with this court, and serve same upon the parties to this proceeding, not later than Wednesday, Nov. 26, 1975, demanding such relief as they deem appropriate including argument in support thereof, and defendants-appellants shall thereafter have a period of 10 days within which to file and serve a responsive memorandum thereto.

RICHARD J. HUGHES,
C. J.

Consent as to form:
William F. Hyland, Attorney General
of New Jersey
Attorney for Defendants-Appellants,
State of New Jersey, et al.

By: STEPHEN L. SKILLMAN,
Stephen L. Skillman,
Asst. Attorney General

Jamieson, McCardell, Moore, Peskin and Spicer

By: HERBERT F. MOORE
Herbert F. Moore

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, N. J. 08618
(609) 395-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

NOTICE OF MOTION.

To: Stephen L. Skillman, Esq.
Assistant Attorney General
State House
Trenton, N. J. 08625

NOTICE is hereby given by the undersigned, counsel for the plaintiffs-respondents, of the filing of a Motion with

the Supreme Court of New Jersey in accordance with the copy attached hereto.

Dated: November 26, 1975

JAMIESON, McCARDELL, MOORE,
PESKIN and SPICER
A Professional Corporation

by: HERBERT F. MOORE
Herbert F. Moore
Counsel for Plaintiffs-Respondents

JAMIESON, McCARDELL, MOORE, PESKIN
and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, New Jersey 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

Docket No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a
JOHN P. FAZZIO LANDFILL CO., et al,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al,
Defendants-Appellants

MOTION FOR REMAND, STAY OF JUDGMENT AND CONTINUATION OF RESTRAINTS

TO: Honorable The Chief Justice
and Associate Justices of
Supreme Court of New Jersey:

The plaintiffs-respondents, City of Philadelphia, City of Glen Cove, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and

DeLorenzo-Interstate Waste Removal Co., Inc. (now Interstate Waste Removal Co., Inc.) move for an order of the New Jersey Supreme Court, in order of preference, and in the alternative, for the following relief:

A. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) all issues raised in the complaint; and (2) whether, and for what period, injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey;

B. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) reasonableness of exercise of police power in context of interstate commerce; (2) taking of private property for public use without just compensation; (3) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

C. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) reasonableness of exercise of police power in context of interstate commerce; (2) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

D. Retention of jurisdiction and remand to the trial court for a plenary hearing on the following issues: (1) whether and for what period injunctive relief should be continued if P. L. 1973, c. 363 is not declared unconstitutional by the state courts in New Jersey.

E. Stay of judgment and continuation of injunctive relief pending a determination by the United States Su-

preme Court of an application by plaintiffs for continuing injunctive relief pending appeal.

Plaintiffs-Respondents will rely upon the annexed Brief and Appendix in support of said Motion.

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation

by: HERBERT F. MOORE
Herbert F. Moore
Counsel for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY
M-436 September Term 1975

—

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC. t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-
Movants,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a stay is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

SUPREME COURT OF NEW JERSEY
M-433 September Term 1975

—

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Movants,

and

JOHN P. FAZZIO LANDFILL, INC. t/a
JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a stay and continuation of injunctive relief is denied; and it is further

ORDERED that the order temporarily staying the judgment and injunctive order, entered November 20, 1975, is vacated, effective December 31, 1975.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

SUPREME COURT OF NEW JERSEY
M-434 September Term 1975

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Movants,

and

JOHN P. FAZZIO LANDFILL, INC.
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-
Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the motion for a remand to the Superior Court, Law Division, for such further proceedings, if any, that that court may deem appropriate is granted; provided, however, that any relief granted by the Law Division shall not include the issuance or continuation of a stay; and it is further

ORDERED that this Court does not retain jurisdiction.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 11th day of December, 1975.

FLORENCE R. PESKOE
Clerk

JAMIESON, McCARDELL, MOORE, PESKIN and SPICER

A Professional Corporation
19 Chancery Lane
Trenton, New Jersey 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY
Docket No. L-15068-73 P.W.
Civil Action

CITY OF PHILADELPHIA, etc, et al,
Plaintiffs,

v.

STATE OF NEW JERSEY, et al,
Defendants.

ORDER

This matter being opened to the Court by Jamieson, McCardell, Moore, Peskin and Spicer, a Professional Corporation, attorneys for plaintiffs, Herbert F. Moore, Esq. appearing, in the presence of Stephen L. Skillman, Esq., Assistant Attorney General of the State of New Jersey, attorney for defendants, and Vincent J. Dotoli, Esq., attorney for plaintiffs-intervenors, and good cause being shown,

It is on this 19th day of December, 1975:

ORDERED, that Counts II, III, IV, V, VI, VII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII contained in plaintiffs' complaint in lieu of prerogative writs filed in

the above captioned matter are hereby dismissed with prejudice; and it is

FURTHER ORDERED, that Counts Two, Three, Four, Five, Six, Seven and Eight of the amended complaint filed by plaintiffs-intervenors in the above captioned matter, are hereby dismissed with prejudice; and it is

FURTHER ORDERED, that, in light of the dismissal of the above counts, and the decision by the New Jersey Supreme Court upholding the constitutionality of *P. L.* 1973, *c.* 363 as representing a valid exercise of the State's police power which does not unreasonably burden interstate commerce and said Court thereby having finally determined Counts I, VIII and XIX of plaintiffs' complaint and Count One of plaintiffs-intervenors complaint, no further proceedings are deemed appropriate by this Court in connection with the above captioned matter.

GEORGE Y. SCHOCH, J. S. C.

William F. Hyland, Attorney General of New Jersey
Attorney for Defendants

By: STEPHEN SKILLMAN
Assistant Attorney General

Consent as to form and entry.
JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER, *A Professional Corporation*
Attorneys for Plaintiffs

By: ARTHUR MEISEL
VINCENT J. DOTOLI,
Attorney for Plaintiff-Intervenors

SUPREME COURT OF THE UNITED STATES

No. A-563

CITY OF PHILADELPHIA, ET AL.,
Appellants

v.

NEW JERSEY, ET AL.

ORDER.

UPON CONSIDERATION of the application of counsel for the appellants and the response filed thereto,

IT IS ORDERED that the judgment of the Supreme Court of New Jersey entered November 18, 1975, in case No. A-82, be and the same is hereby, stayed pending the timely filing of a notice of appeal, the timely docketing of the appeal and action by this Court on the jurisdictional statement in the above-entitled case.

If the appeal is dismissed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the issuance of the mandate of this Court.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 31 day of December, 1975

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States
By FRANCIS J. CORSON

IN THE SUPREME COURT OF THE STATE OF NEW JERSEY

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that City of Philadelphia, City of Glen Cove, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc. (now Interstate Waste Removal Co., Inc.), the Appellants abovenamed, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey, reversing the trial court's declaration that P. L. 1973, c. 363 unconstitutionally discriminates against interstate commerce, entered in this action on November 18, 1975.

This appeal is taken pursuant to 28 U. S. C. § 1257 (2).

JAMIESON, McCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
Counsel for Appellants

by: HERBERT F. MOORE

Dated: January 8, 1976

Supreme Court of the United States

—

No. A-24

—

CITY OF PHILADELPHIA, et al.,
Petitioners,

v.

NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.

—

ORDER.

—

UPON CONSIDERATION of the application of counsel for the petitioners, the response filed thereto, the memorandum of the United States as Amicus Curiae, and the reply of petitioners,

IT IS ORDERED that the judgment of the Supreme Court of New Jersey, A-82, entered June 20, 1977, be and the same is hereby stayed pending the timely filing of a notice of appeal, the timely docketing of the appeal and action by this Court on the jurisdictional statement in the above-entitled case.

If the appeal is dismissed, this order is to terminate automatically. In the event that jurisdiction is noted or

postponed, this order is to remain in effect pending the issuance of the mandate of this Court.

/s/ WM. J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 18th
day of July, 1977

A true copy MICHAEL RODAK, JR.
Test:
Clerk of the Supreme Court of the United States

By LAURENCE P. GILL
Deputy

IN THE SUPREME COURT OF THE
STATE OF NEW JERSEY

—

No. _____

—

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DELORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.)
Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Notice is hereby given that City of Philadelphia, City of Glen Cove, Landfill and Development Company, MAC Sanitary Landfill, Inc., Kinsley's Landfill, Inc. and DeLorenzo-Interstate Waste Removal Co., Inc. (now Interstate Waste Removal Co., Inc.), the Appellants abovenamed, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey entered on June 20, 1977, on Remand from the Supreme Court of the United States.

Appellants further appeal from the prior judgment of the Supreme Court of the State of New Jersey entered in this action on November 18, 1975, which judgment was vacated by the Supreme Court of the United States by its mandate issued on March 22, 1977, and subsequently reaffirmed by the Supreme Court of New Jersey by its judgment entered on June 20, 1977.

This appeal is taken pursuant to 28 U. S. C. § 1257(2). Review will be sought, in the alternative, by certiorari pursuant to 28 U. S. C. § 1257(3).

JAMIESON, MCCARDELL, MOORE,
PESKIN & SPICER
A Professional Corporation
Counsel for Appellants

by: /s/ HERBERT F. MOORE
Herbert F. Moore
19 Chancery Lane
Trenton, New Jersey 08618
(609) 396-5511

Dated: July 22, 1977

Certificate of Service.

I hereby certify that on this 22nd day of July, 1977, a copy of the Notice of Appeal was mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, to Vincent J. Dotoli, Esq., attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey 07080, and to David N. Samson, Esq., attorney for defendants-respondents in the companion case Hackensack Meadowlands v. Mun. Landfill Auth., A-81 (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey 07052; and to Honorable Wade H. McCree, Jr., Solicitor General of the United States Department of Justice, Washington, D. C. 20430.

I further certify a that all parties required to be served have been served.

HERBERT F. MOORE
Herbert F. Moore

AFFIDAVIT OF LEO F. HUGHES, 3rd.

(January 16, 1974.)

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY – LAW DIVISION
Civil Action

LANDFILL AND DEVELOPMENT COMPANY, a N. J. corporation, M. A. C. LANDFILL, INC., a N. J. corporation, KINSLEY'S LANDFILL, INC., a N. J. corporation, DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC., a N. J. corporation and CITY OF PHILADELPHIA, a municipal corp. of the Commonwealth of Pa.,

Plaintiffs,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of New Jersey,

Defendants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

LEO F. HUGHES, 3rd, of full age, being duly sworn according to law, upon his oath says:

1. I am the President of Landfill and Development Company (hereinafter L & D), a public utility of the State of New Jersey holding a duly issued temporary Certificate of Public Convenience and Necessity by the New Jersey

Public Utilities Commission. L & D duly and timely filed an application with the New Jersey Department of Environmental Protection, Solid Waste Management Bureau, for the issuance of a Sanitary Landfill Registration Certificate, and a temporary certificate was duly issued by said Department.

2. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of a motion for an order temporarily restraining the enforcement of P. L. 1973, c. 363 (being a supplement to the Waste Control Act, N. J. S. A. 13:1I-1 et seq.), and the adoption or enforcement of N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 being part of a Revision to the Rules of the Bureau of Solid Waste Management proposed by the Department of Environmental Protection.

3. The disposal of solid waste is governed by Chapter VIII, "Refuse Disposal" of the New Jersey State Sanitary Code, which Code is enforced by the aforesaid Department of Environmental Protection.

4. In accordance with authority conferred by N. J. S. A. 13:1E-1 et seq. and N. J. S. A. 13:1I-1 et seq., the said Department of Environmental Protection proposed a comprehensive revision to the Rules of the Bureau of Solid Waste Management which would further govern and regulate the operation of sanitary landfills in New Jersey, including the treatment and disposal of solid waste therein.

5. L & D has entered into a written contract with the City of Philadelphia pursuant to which L & D has agreed to treat and dispose of a stated quantity of solid waste which originates or is collected in said City.

6. Section 7:26-1.8.2, being one section in the aforesaid proposed Revision to the Rules of the Bureau of Solid Waste Management, provides that,

> "no person owning or operating a solid waste facility located within the territorial limits of this State shall accept for disposal in such solid waste facility any solid waste which originated or was collected outside of the territorial limits of this State."

7. In addition, P. L. 1973, c. 363 which will become effective February 1, 1974, provides that no wastes generated outside of the State of New Jersey shall be treated or disposed of within said State, and further provides as follows:

> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State."

8. In the event the Commissioner of the Department of Environmental Protection does not, prior to February 1, 1974 (a) determine that waste which originates or was collected outside of New Jersey can be disposed of within said state without endangering the public health, safety and welfare and (b) promulgates regulations permitting and regulating the treatment and disposal of such waste, then L & D will be prohibited from the further treatment and disposal of waste in accordance with the terms of its written contract with the City of Philadelphia.

9. If L & D is prohibited from fulfilling the terms of its obligations with the City of Philadelphia, it will lose very substantial and considerable profits, and will suffer

grievous damages, the amount of which cannot be calculated with any reasonable certainty.

Based upon existing regulations governing the treatment and disposal of solid waste, the State of New Jersey will not be materially or substantially adversely affected by the issuance of a temporary restraining order, while on the other hand, the business of L and D would be grievously and substantially affected if such restraining order was not granted.

10. Upon information and belief the proposed Rule 7:26-1.8.2 and P. L. 1973, c. 363 was motivated by a desire on the part of the State of New Jersey to assure the availability of landfill acres in New Jersey for solid waste generated in that state and, as an incident thereto, to stabilize the cost of solid waste disposal for New Jersey residents. Said information and belief is based upon (a) a statement by the New Jersey Department of Environmental Protection appearing on pages 7 and 8 of a document entitled, "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management", a copy of which section is attached hereto and made part hereof as Exhibit A, and, (b) the last paragraph of a letter dated December 16, 1973 from Richard W. DeKorte, Counsel to the Governor to David Quient, Esquire, City Attorney of the City of Glen Cove, which states that S. 2367 (O. C. R.) (now P. L. 1973, c. 363) would not be introduced "had the sister states of New Jersey permitted solid wastes originating in our state to be disposed of at or near the point of origination." A copy of said letter is attached hereto and made part hereof as Exhibit B.

11. Accordingly, both P. L. 1973, c. 363 and proposed rules N. J. A. C. 7:26-1.8.1 and N. J. A. C. 7:26-1.8.2 appear to be retaliatory in nature and not actually based upon the immediate potential for harm to the health of the community.

12. Federal legislation encourages interstate and regional solutions, where applicable, to solid waste disposal and recovery as evidenced by 42 U. S. C. A. § 3254, a copy of which is attached hereto as Exhibit C.

13. In addition to the aforesaid, if L & D is prohibited from disposing of solid waste which originated or was collected outside of New Jersey, the continued operation of said sanitary landfill may be and become economically unfeasible, thereby impairing the public interest.

LEO F. HUGHES, 3RD
Leo F. Hughes, 3rd

Sworn to and subscribed before me this 16th day of January, 1974.

ARTHUR MEISEL
Arthur Meisel
Attorney at Law of New Jersey

Exhibit A.

• • •

IV. *Out-of-State Waste*

In 1971, at least 1½ million tons of solid waste generated outside of New Jersey were buried within this State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the degradation of our environment, and is increasing the cost of disposal for our own municipalities. The depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.

It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban regions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.

Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that

same period only nine new disposal sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously high. The lands now utilized for sanitary landfills are limited, and both industry and local government have expressed concern over the scarcity of suitable new sites.

One measure of the problem is the increasing volume of waste which requires disposal each year. While the rate of waste generation within New Jersey is rising steadily, the volume of waste imported from other states is increasing at an alarming rate. The depletion or abandonment of solid waste facilities in our neighboring states has greatly affected the tonnage of solid waste which is brought into New Jersey for disposal.

The legislature, in recognition of the rapidly increasing volume of waste imported into New Jersey, enacted the "Waste Control Act" (N. J. S. A. 13:1I-1 et seq.) which was signed into law on February 21, 1973. That statute, effective March 1, 1973, empowers the Department of Environmental Protection to prohibit or control the disposal of out-of-state wastes in New Jersey. The proposed regulations would prohibit the disposal of wastes generated or collected outside of the State at solid waste facilities within the State (N. J. A. C. 7:26-1.8).

• • •

Exhibit B.

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
TRENTON

WILLIAM T. CAHILL
Governor

RICHARD W. DEKORTE
Counsel for the Governor

December 26, 1973

David Quient, Esq.
City Attorney
City Hall
Glen Cove, New York 11542

Re: Jamaica Ash & Rubbish Removal Co. Inc.

Dear Mr. Quient:

Governor Cahill has asked me to reply to your letter of December 13, 1973 with respect to the letter of December 11, 1973 addressed to the Governor from the firm of Rosenberg, Rosenberg & Rockman. The subject matter of that letter apparently refers to Senate Bill No. 2367 (OCR), currently before the Governor for his review. Enclosed is a copy of that bill for your information.

This bill grants to the Commissioner of Environmental Protection the power to promulgate regulations to permit certain types of solid and liquid waste to be disposed of in the State of New Jersey. May I suggest, therefore, that you review the regulations of the Department, both promulgated and pending, to determine the status of the rubbish removal program of the City of Glen Cove.

Also, I might add that Senate Bill No. 2367 (OCR) would not have been introduced had the sister states of

New Jersey permitted solid wastes originating in their states to be disposed of at or near the point of origination.

Very truly yours,

RICHARD W. DEKORTE
Richard W. DeKorte
Counsel to the Governor

Encl.
cc: Richard J. Sullivan, Commissioner
Dept. of Environmental Protection
Rosenberg, Rosenberg & Rockman

Exhibit C.

§ 3254. Encouragement of interstate and interlocal cooperation

The Secretary shall encourage cooperative activities by the States and local governments in connection with solid-waste disposal programs; encourage, where practicable, interstate, interlocal, and regional planning for, and the conduct of, interstate, interlocal, and regional solid-waste disposal programs; and encourage the enactment of improved and, so far as practicable, uniform State and local laws governing solid-waste disposal.

MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR STAY PENDING COMPLETION OF REMAND AND FOR EXPEDITED BRIEFING AND ARGUMENT.

To: Clerk of the Court

Jamieson, McCardell, Moore,
Peskin & Spicer, Esqs.
Attorneys for Plaintiffs-Respondents
19 Chancery Lane
Trenton, New Jersey 08618
Attn: Herbert F. Moore, Esq.

Sirs:

Please Take Notice that the undersigned, representing the defendants-appellants, Department of Environmental Protection and Commissioner of Environmental Protection, hereby moves for clarification that the court's prior orders permit enforcement of chapter 363 of the Laws of 1973 or, in the alternative, for a stay of any lower court injunctive order which may be found presently to bar enforcement of chapter 363, and the defendants-appellants further move for the setting of an expedited schedule for the filing of briefs and oral argument on the remand from the Supreme Court of the United States.

In support of this motion, the defendants-appellants will rely upon the attached brief, affidavits and appendix.

William F. Hyland
Attorney General of New Jersey
Attorney for Defendants-Appellants, State of New Jersey, Department of Environmental Protection of the State of New Jersey and Commissioner of the Department of Environmental Protection.

By /s/ Stephen Skillman
Stephen Skillman
Assistant Attorney General

Dated: March 15, 1977

ORDER GRANTING MOTION FOR ACCELERATION

SUPREME COURT OF NEW JERSEY

September Term 1976

M-724 – M-725

CITY OF PHILADELPHIA, et al.,
Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Movants.

This matter having been duly presented to the Court, it is ORDERED that the motion for acceleration is granted; and it is further

ORDERED that the decision as to defendants' motion for relief is reserved at this time in view of the accelerated schedule fixed herein; and it is further

ORDERED that plaintiffs serve and file their brief on the merits on or before Wednesday, April 20, 1977 and that defendants serve and file their response thereto on or before Monday, May 2, 1977; and it is further

ORDERED that this matter be set down on Tuesday, May 10, 1977, for argument on the merits and as to whether defendants' motion for a stay (M-725-76) should be granted.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 4th day of April, 1977.

FLORENCE R. PESHOE
Clerk

AFFIDAVIT OF FRANK J. KUSERK.

(May 6, 1977.)

STATE OF NEW JERSEY
COUNTY OF GLOUCESTER } *ss.:*

Frank J. Kuserk, being duly sworn according to law upon his oath deposes and says:

I am the Supervisor of Air and Water Conservation for Texaco Inc., at the Eagle Point Plant in Westville, N. J.

This plant generates biological sludge.

This sludge had been disposed of in New Jersey, at the Ken-buc Landfill in Edison, New Jersey. This landfill was recently closed down.

I inquired of the Department of Environmental Protection of the state of New Jersey for a location to send this sludge for disposal. I was informed that there was no facility available in New Jersey unless we could increase the solids content to 25%. The Department of Environmental Protection mailed me a list of facilities (attached) located in the state of Pennsylvania and suggested we use one of these.

We are presently disposing of the biological sludge generated by this plant in the state of Pennsylvania.

F. J. KUSERK
F. J. Kuserk

Sworn to and Subscribed before me this 6th day of May, 1977.

RANDOLPH D. NORRIS
Randolph D. Norris
Attorney-At-Law

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION

From the desk of

BEATRICE S. TYLUTKI, *Director*

Solid Waste Administration

Frank Kuserk:

Enclosed is a list of alternative landfill sites located in Pennsylvania that may be able to handle your waste sludge.

I would suggest contacting these people directly and then finding a hauler to transport the sludge to one of these locations.

/s/ RON BUCHANAN

TABLE A

FACILITIES WITH APPROVED MAN-MADE LINERS IN PENNSYLVANIA.

[*Note: Balance of Table is not printed—original illegible.*]

AFFIDAVIT OF RAY ROTHSCHILD.

(June 27, 1977.)

STATE OF NEW JERSEY
COUNTY OF UNION } *ss.:*

RAY ROTHSCHILD, of full age, being duly sworn upon his oath, according to law, deposes and says:

1. I am the President of Perk Chemical Co., Inc. of 217 South First Street, Elizabeth, N. J.

2. Perk Chemical Co. is engaged, among other things, in the spent chemical removal and recycling business.

3. The majority of our spent chemical customers are small businesses whose processes create chemical waste that cannot be disposed of by conventional means. This company collects for several hundred companies throughout the entire State of New Jersey.

4. The recycling process creates a residual waste which cannot be disposed of in conventional sanitary landfill sites. Until July of 1976, Perk Chemical used Kin Buc Sanitary Landfill in Edison, N. J. to dispose of these wastes. Since the closing of Kin Buc we can no longer dispose in New Jersey.

5. I have contacted the New Jersey Department of Environmental Protection, Solid Waste Division and discussed this problem with Mr. Rosenberg. I have been advised by the DEP that there is no place in New Jersey suitable for this waste and Mr. Rosenberg has recommended facilities in Pennsylvania, New York and more distant states. Some of the waste we have been compelled to haul to disposal sites more than 500 miles from Elizabeth, N. J.

6. At the present time our operation, and consequently that of the many, many customers from which we collect, are totally dependent upon facilities outside the State of New Jersey for disposal.

RAY ROTHSCHILD
Ray Rothschild

Sworn to and Subscribed before me this 27th day of June, 1977.

/s/ BARBARA Q. CHODACH
A Notary Public of the State of New Jersey
My Commission Expires on 8/14/77

AFFIDAVIT OF WILBUR HENRY.

(May 5, 1977.)

STATE OF NEW JERSEY }
COUNTY OF SOMERSET } *ss.:*

WILBUR HENRY, of full age, being duly sworn upon his oath according to law, deposes and says:

1. I am the Manager of Purchasing, Organic Chemical Division of American Cyanamid, Bridgewater Township, Somerset County, New Jersey.

2. This Company generates a commercial chemical type of waste. For many years this waste was disposed of at a New Jersey facility identified as Kin Buc Landfill, Edison, N. J.

3. On July 2, 1976, the New Jersey Department of Environmental Protection advised American Cyanamid by a letter to Daniel Dowiak that it could no longer use the Kin Buc site for chemical waste disposal. A copy of that letter is attached.

4. The D. E. P. also forwarded to American Cyanamid, by the same letter, a list of facilities in New Jersey and various other states that were permitted to handle various types of waste.

5. I contacted all of the New Jersey facilities and for one reason or another they were unable to accept our entire output of this chemical waste.

6. Chem-Trol in Model Cities, New York agreed to accept this waste. For a time American Cyanamid did use the New York facility, however, for various reasons they were unable to continue to accept this waste.

7. I then located a facility in Pennsylvania which is the only facility we are using for disposal of this waste.

WILBUR HENRY
Wilbur Henry

Sworn to and Subscribed before me this 5th day of May, 1977.

RANDOLPH D. NORRIS
Randolph D. Norris
Attorney at Law of New Jersey

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Solid Waste Administration
Trenton. 08625

BEATRICE S. TYLUTKI
Director

July 2, 1976

Mr. Dan Dowiak
American Cyanamid Company
Berdan Avenue
Wayne, NJ 07470

Dear Mr. Dowiak:

This is in response to your recent inquiry regarding mercury wastes from your Bound Brook plant and the advisability of disposing of this material at the Kin-Buc Landfill in Edison Township, Middlesex County, New Jersey.

The Kin-Buc Landfill has been registered with the Department of Environmental Protection since 1970 for the acceptance of chemical and hazardous waste and they continue to be so registered.

The Kin-Buc Landfill has been the site of numerous environmental problems in recent months. The site has been accepting quantities of chemical and hazardous wastes greatly exceeding the amount which it is capable of handling properly. In view of these problems and due to the type of waste (2% mercury in organic solution) you have described to us, the Solid Waste Administration does not recommend the disposal of this material by landfilling.

Attached is a list of Waste Processing Facilities. Please contact these facilities directly regarding their ability to accept your waste material. It is quite possible that these facilities will require the separation of the mercury from the solution before acceptance.

If we can be of any further help in this matter, please feel free to contact this office.

Very truly yours,

LINO F. PEREIRA
Lino F. Pereira
Supervising Environmental Specialist
Solid Waste Administration

oms
Attachment

NEW JERSEY

Facility	*Type of Treatment*	*Type of Waste Accepted*
Astro Pak Corp. P. O. Box 796 235 Forrest Street Metuchen, NJ 08840 (201) 549-1788	Neutralization	Petro-base wastes including still and tank bottoms, organic sludge, chemical wastes and chemical by-products.
Blackwood Carbon Products Little Gloucester Road Blackwood, NJ (609) 227-8822	Oil Recovery	Recycle waste oil to obtain Grade 4 industrial fuel oil.
Browning Ferris Industries Chemical Services Division P. O. Drawer C Pedricktown, NJ 08067 (609) 299-0835	Chem-Fix Lagoon	Liquid and semi-liquid waste that can be chem-fixed (Liq-Wa-Con Method). If approved by BSWM, the wastes may then be landfilled at a designated site. Facility should be operating in about 2 months.
Chemical Control Corp. 23 South Front Street Elizabeth, NJ (201) 351-5460	Incineration Neutralization Solvent Recovery	Various liquid and solid chemicals, acids, solvents, etc.
Marisol Inc. 125 Factory Lane Middlesex, NJ 08846 (201) 469-5100	Solvent Recovery	Liquid organic chemicals, cleaners, halogenated hydrocarbons, oil wastes for reclamation.
National Converters, Inc. 459 Chestnut Street Union, NJ 07083 (201) 964-1550	Solvent Recovery	Chlorinated solvents, acids, alkalis, and other chemicals.
Rollins Environmental Serv. Inc. P. O. Box 221 Bridgeport, NJ 08014 (609) 467-3100	Incineration Neutralization Chemical Treatment Recovery	Industrial chemical wastes, limited explosives, poisons, including: acids, caustics, chlorinated and non-chlorinated organics, plating and etchant solutions, paint sludges, pesticides, cyanide, scrubber effluents, etc.
Scientific Chemical Processing 216 Paterson Plank Road Carlstadt, NJ 07072 (201) 589-7777	Solvent Recovery	Solvents, paint, oils, chlorinated hydrocarbons, acids, bases, slurries etc.
Solvent Recovery Service of NJ Sylvan Street Linden, NJ 07036 (201) 925-8800	Solvent Recovery	Chemical wastes, solvents. Specialize in distillation for recovery of solvents.

NEW YORK

Company	*Type of Waste Accepted*
Chemical Waste Disposal Corporation 42-14 19th Avenue Astoria, New York 11105 (212) 274-3339	Recovery/distillation of chlorinated solvents, and related solvents.
Chem-Trol Pollution Services, Inc. P. O. Box 200 Model City, New York 14104 (716) 754-8231	Most types of chemical-related wastes including solvents/cleaners, halogenated hydrocarbons, paint & coating sludges, oils and oily waste, toxic acids, alkalis, plating/etching wastes, cyanides, heavy metal solutions & residues, pesticides/PCB's, carcinogens, sludges and solids, arsenic and mercury wastes.
Frontier Chemical Waste Process, Inc. 4626 Royal Avenue Niagra Falls, New York 14303 (716) 285-8200	Industrial by-products and wastes of both organic and inorganic composition and of spec. materials. Electroplating; metal-finishing waste of heavy metals (Cr, Ca, Ni, Zn, Cd, Hg, Sn, Sb, Pb, As, etc.), acids, bases, salts, cyanide, cyinate, carsenogenics, compounds, oil, paints, inks, heterocyclics and halogenated compounds.
Pollution Abatement Services 155 East Third Street Oswego, New York 13126 (315) 343-3356	Oil wastes, paint sludges, solvents/cleaners, still and tank bottoms, and generally any organic or aqueous liquid.
Recycling Laboratories 112 Harrison Place Syracuse, New York 13202 (315) 422-4311	Industrial solvents (chlorinated and non-chlorinated caustics and acids with heavy metals, oil, vinyl, polyesters and pigment sludges.

PENNSYLVANIA

Company	*Type of Waste Accepted*
Chemfix Corporation 2901 Banksville Road Pittsburgh, Pennsylvania (412) 343-8611	Heavy metals, Neutralizes pickle liquors, cyanides, sludges, liquid and semi-liquid waste sludges—Handles only non-organics.
Chemical Application Company 116 Water Street Beverly, Massachusetts 01915 (617) 927-1680	Acids, caustics, halogenated hydrocarbons, oil wastes, solvents/cleaners, still and tank bottoms.

Company	*Type of Waste Accepted*
Safety Projects and Engineering, Inc. 3 Malden Street West Quincy, Massachusetts (617) 471-1327	No available list.
Silresim Chemical Corporation 86 Tanner Street Lowell, Massachusetts 01852 (617) 459-7342	Oil waste, solvents.

MAINE

Company	*Type of Waste Accepted*
The Crago Company, Inc. P. O. Box 409 Gray, Maine 04039 (207) 657-4785	Acids, caustics, halogenated hydrocarbons, heavy metals in solution, oil waste, paint sludge, pesticides, sludge and tank bottoms.

AFFIDAVIT OF ROBERT MEAGHER.

(May 5, 1977.)

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

I, Robert Meagher, of full age, being duly sworn upon my oath according to law depose and say:

1. I am the President of Scientific, Inc., Scotch Plains, New Jersey.

2. On March 21, 1977, I attended a meeting held in the office of Beatrice Tylutki, the Director of the Bureau of Solid Waste Administration of the Department of Environmental Protection. Attending the meeting were Director Tylutki, Hank Jatczak, Deputy Director, Jack Van Dalen, Deputy Attorney General and Robert Meagher, the deponent herein, Gary A. Maham of Scientific, Mrs. Jerry Chafin, Vice President of Scientific, Richard Paluso, P. E. and Ted Schwartz, Esquire.

3. In part, the discussion centered around how leachate being generated at Kin Buc Landfill, Edison, New Jersey, was to be treated and disposed of. Director Tylutki emphatically stated that it could not be disposed of in New Jersey. She stated, "Take it to Pennsylvania."

ROBERT MEAGHER
Robert Meagher

Sworn and Subscribed to before me this 5th day of May, 1977.

RANDOLPH D. NORRIS
Randolph D. Norris
Attorney at Law of New Jersey

AFFIDAVIT OF NORMAN ROSENFARB.

(May 5, 1977.)

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

I, Norman Rosenfarb, of full age, being duly sworn upon my oath according to law depose and say:

1. I am the Sales Representative of R & R Sanitation Company, Box 422, R. D. #4, Dover, New Jersey 07801.

2. R & R Sanitation Company hauls domestic and industrial waste collected within the State of New Jersey.

3. We dispose of wastes for M & M Candy Company which wastes are food processing wastes. These wastes were disposed through Ocean Disposal in Kearney, New Jersey, until their permit expired for ocean dumping. Next, those wastes were disposed of through the landfill facility at Kin Buc until that facility was closed.

4. Thereafter, these wastes were disposed of at Grows Landfill in Morrisville, Pennsylvania, and some other sites. Grows Landfill became unavailable for dumping for us in the first two weeks of April, 1977.

5. As a result of the unavailability of Grows Landfill in Pennsylvania, I telephoned Dr. Ron Buchanan at the Hazardous Waste Section of the Department of Environmental Protection and requested from him suggestions as to where we might continue disposing of the wastes which we had. I suggested at that time Ocean County Landfill in New Jersey or Southern Ocean County Landfill in New Jersey. Dr. Buchanan suggested Chrins in Easton, Pennsylvania, as a site for the dumping. Dr. Buchanan did not suggest any sites in the State of New Jersey for the dis-

posal of these wastes. As I had never heard of Chrins, I contacted them with the result that we began disposing of wastes there which we continue to do to this date.

6. Subsequent to that telephone call, Dr. Buchanan and I spoke again on the telephone at which time he indicated that Ocean County Landfill and Southern Ocean County Landfill would not be appropriate sites for any of our disposal of wastes as there had been a meeting with Beatrice Tylutki, Director of the Bureau of Solid Waste Administration of the Department of Environmental Protection, at which time it was decided that the policy of the Department would be that there would be no new streams of waste permitted at landfill sites in the State of New Jersey.

NORMAN ROSENFARB
Norman Rosenfarb

Sworn and Subscribed to before me this 5th day of May, 1977.

RANDOLPH D. NORRIS
Randolph D. Norris
Attorney at Law of New Jersey

AFFIDAVIT OF RONALD KILEY.
(May 6, 1977)

STATE OF NEW JERSEY
COUNTY OF PASSAIC } *ss.:*

Ronald Kiley, being sworn upon his oath, according to law, deposes and says:

1. I am Operations Manager for Gaess Environmental Services Co. at their Passaic plant, in Passaic, New Jersey.

2. I am responsible for dispatching our collection vehicles for servicing the disposal needs of industry in New Jersey.

3. Since the closing of the Kin-Buc landfill in Edison, New Jersey, Gaess Environmental Services Co. has been compelled to transport solid and liquid waste collected from New Jersey industries hereinafter named to disposal facilities in the State of Pennsylvania and New York State because there is no other available facility in New Jersey.

4. The following are some of the industries from which we haul solid and liquid waste to these disposal sites.

Hoffman La Roche
F. M. C. Corporation
Union Carbide
R. C. A.
Stauffer Chemical
Diamond Shamrock
ICI United States
Western Electric
BASF Wyandotte

There are at least twenty-five other companies of various sizes which we service.

5. These wastes are primarily chemical wastes.

RONALD KILEY
Ronald Kiley

Sworn to and Subscribed before me this 6th day of May, 1977.

PETER W. RADICE
Peter W. Radice
Notary Public of N. J.

PETER W. RADICE, JR.
Notary Public of New Jersey
My Commission Expires April 4, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. _____

CITY OF PHILADELPHIA, et al.
Petitioners

v.

STATE OF NEW JERSEY, et al.
Respondents.

AFFIDAVIT OF VINCENT A. SUOZZI.

(July 6, 1977.)

STATE OF NEW YORK
COUNTY OF NASSAU } *ss.:*

VINCENT A. SUOZZI, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Mayor of the City of Glen Cove, New York, one of the above-named plaintiffs and have personal knowledge of the matter herein contained.

2. For the past 5 years Glen Cove has contracted with Jamaica Ash and Removal Company for collection and disposal of the solid waste generated within Glen Cove. This company has been disposing of this waste in New Jersey simply because there is no facility available on Long Island. All of the landfills operating around Glen Cove are municipally owned and operated for their exclusive use.

3. I have discussed this disposal problem with Mr. Fazzini, Vice President of Jamaica Ash and Removal Company and I am satisfied that closing of New Jersey to out-of-state waste will leave our collector without a source for disposal. As solid waste accumulates in Glen Cove, a serious health hazard is anticipated. There is no solace in knowing Glen Cove may have a contractual claim against the collector.

4. Three years ago we commenced work on a long-term solution to our solid waste problem. Glen Cove needed a new sewer plant and our plan was to incorporate as a second phase an incinerator for sludge that would also incinerate municipal solid waste. Environmental Protection Agency has approved the sewer plant and construction will actually start next month. The use of an incinerator for sludge and municipal waste is unique and because of this uniqueness we have received not only EPA approval but a federal commitment for funding. The engineering for this incinerator is complete. We are now negotiating with the State of New York for supplemental funding. Specifications are being prepared. It is anticipated that this incinerator will be in construction and operation in two to two and one-half years from now. For the time being, therefore, we are utterly dependent upon New Jersey.

VINCENT A. SUOZZI
Vincent A. Suozzi

Sworn to and Subscribed before me this 6th day of July, 1977.

V. ALLAN BAUSO
V. Allan Bauso
Attorney at Law
Admitted to Practice
in New York State

AFFIDAVIT OF RICHARD A. PELUSO.
(June 29, 1977)

STATE OF NEW JERSEY
COUNTY OF BERGEN } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Civil Engineering, majoring in Environmental Engineering and have completed course work toward a doctor's degree in said field.

3. I am Vice-President of Wehran Engineering Corporation which company specializes in the design of sanitary landfills and solid waste management in general.

4. On January 16, 1974, January 31, 1974, November 25, 1975, and March 30, 1977, I executed affidavits filed in this action. These affidavits were subsequently filed in the Supreme Court of the United States in conjunction with plaintiffs then motion for a stay. The facts therein stated remain unchanged except to the extent they are supplemented by this affidavit. Copies of these affidavits are attached.

5. On behalf of plaintiffs who are engaged in private enterprise and others, I do extensive work with the Department of Environmental Protection. I am familiar with the Department of Environmental Protection public records. I have made inquiry in the Bureau of Solid Waste Management of the Department of Environmental Protection whether they had any records indicating the acreage of land in New Jersey suitable and available as potential sanitary landfill sites. I have been advised that no such survey has ever been made and that the Department

possesses no specific knowledge of the amount or location of land suitable and available for future sanitary landfill use in the state. The only census records this Department maintains concerning sanitary landfills are those existing and those in the application process. As an engineering specialist in engineering design of sanitary landfills, I have spent considerable time the last five years in New Jersey travelling the length and breadth of the state by air and by car. In my affidavit of November 25, 1975, I stated that there is extensive acreage in need of land reclamation that is suitable, from an environmental point of view, for sanitary landfills should the economic need for same arise. No affidavits opposing this viewpoint has ever been filed on the matter by the Bureau of Solid Waste Management of the Department of Environmental Protection. It is now well recognized that the many problems that can emanate from disposal of solid or liquid waste on land are controllable. The regulations of the New Jersey Department of Environmental Protection and Environmental Protection Agency reflect this. Sanitary landfills are being designed and operated that will avoid degradation of the environment and will avoid impairing public health.

6. The greatest cost factor in solid waste disposal today is hauling the refuse from the place of origination to the disposal facility. The time consumed in transporting is affected by mileage, road conditions, and traffic congestion.

7. Kinsley's Landfill in Gloucester County, New Jersey, one of the plaintiffs herein, is comprised of approximately 335 acres. Approximately 70 acres are currently in operation as a sanitary landfill. The environmental controls that have been designed for the entire landfill of approximately 335 acres are estimated to cost in excess of $1,000,000.00. From my observations, it is my opinion

that at least 75 percent of the volume going into this landfill comes from Philadelphia.

The Mount Holly Sanitary Landfill, located in the towns of Mount Holly, Easthampton, and Lumberton, Burlington County, New Jersey, is in the process of installing environmental controls which will also cost in the order of $1,000,000.00. Over 75 percent of the volume going into this landfill comes from Philadelphia.

8. The Parklands Reclamation Project located in Bordentown Township, County of Burlington, New Jersey, consists of approximately 90 acres and has recently received an approved registration with extensive environmental controls. The heavy equipment necessary for the operation of this landfill has an approximate cost value of $600,000.00.

9. The type of environmental controls that are incorporated into modern sanitary landfills and the problems they are designed to correct are:

(a) Gas venting systems—To disburse methane gas so it will not accumulate.

(b) Aeration devices and lagoons—To evaporate and minimize leachate problems.

(c) Impermeable liners—To protect underground aquifers from leachate contamination.

(d) Fencing—To control scattering of debris.

(e) Modern compaction equipment—To increase density of solid waste.

(f) Perimeter collecting drains—To handle surface runoffs for control of possible flooding.

(g) Spraying—Odor control.

(h) Spraying and extermination—For rodent control.

(i) Monitoring wells—To make certain leachate systems are working properly.

(j) Gas monitoring wells—To make certain that methane gas venting systems are functioning.

(k) Other physical and chemical treatment processes —For leachate treatment and disposal.

10. The commercial collection and use of methane gas for heating and power generation is now becoming practical and feasible.

11. Sanitary landfills properly designed and operated in accordance with regulations of the New Jersey Department of Environmental Protection, permit conversion of mined, worthless lands to beneficial uses, the most acceptable being recreational.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and Subscribed before me this 29th day of June, 1977.

STEPHINI VOZZA
Stephini Vozza
Notary Public, State of New Jersey
Residing in Passaic County
My commission expires March 30, 1982

AFFIDAVIT OF RICHARD A. PELUSO.
(March 30, 1977)

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed course work toward a doctor's degree in said field.

3. I am Vice President of Wehran Engineering Corporation which company specializes in the design of sanitary landfills and solid waste management in general.

4. A sanitary landfill is recognized by authorities and knowledgeable experts in the field of solid waste management as an environmentally sound method of solid waste disposal and a vital tool for land reclamation. The United States Environmental Protection Agency, in its 1976 publication entitled "Decision-Makers Guide in Solid Waste Management (SW-500)", states on page 109, "Every community needs access to a sanitary landfill for environmentally safe disposal of its solid waste." The solid waste management rules of the Bureau of Solid Waste Management of New Jersey require the operation of sanitary landfills in an environmentally sound manner (N. J. A. C. 7:26-1 et seq.).

5. Sanitary landfills are developed in lifts of 12 feet. There is no limitation in the regulations of the Bureau of Solid Waste Management concerning the number of lifts. This depends entirely upon the design of the landfill. From my wide experience in designing and supervising landfills in New Jersey the average elevation is in excess

of 50 feet. Operating a sanitary landfill to a depth of 20 feet would not be typical. Consequently, Mr. Lind's statement in paragraph 2 of his affidavit that almost one square mile of landfill area has been used since 1974 is a gross exaggeration.

6. I was the consulting engineer for MAC Sanitary Landfill. Contrary to Mr. Lind's averment in paragraph 5, this landfill was *not* closed because "of environmentally (including odor problems) and aesthetic considerations." This landfill was closed simply because it had reached its capacity in accordance with the engineering design on file with the Department of Environmental Protection.

7. The sanitary landfill proposed for the abandoned Church Brick clay mines in Bordentown, Burlington County, referred to in paragraph 5 of the Lind affidavit, has been designed by the firm with whic[illegible] associated and I am fully familiar with it. As a result of many years of clay mining the land is presently useless. Without land reclamation through a sanitary landfill this acreage will forever lie fallow.

8. Upon information and belief the D. E. P. has never undertaken a survey of suitable and available landfill sites in New Jersey. It is common knowledge that there are many hundreds of acres of land in New Jersey that have been scarified in mining operations. The most sensible and environmentally sound manner of reclaiming this land is through sanitary landfills.

9. Mr. Lind, in paragraph 6 of his affidavit, asserts that landfills increase health hazards by generating leachate and methane gas, attracting rodents and causing fires. The solid waste management rules of the Bureau of Solid Waste Management which Mr. Lind is charged with the responsibility of enforcing, clearly and emphatically prohibit the operation of sanitary landfills that permit leachate to escape into the underground acquifers or cause any of the health hazards that he has enumerated. The solid waste management rules mandate that there be no fires, provides for rodent control and the proper disbursement of methane gas. However, the commercial use of methane gas generated by landfills is practical and in use in various parts of the United States. In New Jersey, the Edgeboro disposal landfill uses its methane gas for commercial purposes.

10. Completed sanitary landfills have been used for many purposes. Recreational uses such as parks, playgrounds and golf courses have been most predominant, however, there are many instances of shopping centers, post offices, airports, etc. having been built on land reclaimed by sanitary landfills. The United States E. P. A. has documented these uses in many of its publications.

11. It is within the control of the Bureau of Solid Waste Management of the D. E. P. of the State of New Jersey to eliminate "bad" landfills that Mr. Lind alleges exist in New Jersey. Simply eliminating the disposal of out of state waste will not convert a "bad" landfill into a good one. Enforcement by the Bureau of Solid Waste Management of its rules will eliminate any "bad" landfills. New Jersey can then enjoy the benefits of land reclamation through sanitary landfilling.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and Subscribed before me this 30th day of March, 1977.

HERBERT F. MOORE
Herbert F. Moore
Attorney at Law of New Jersey

AFFIDAVIT OF RICHARD A. PELUSO.

(November 25, 1975.)

SUPREME COURT OF NEW JERSEY

DOCKET No. A-82-74

SEPTEMBER TERM 1974

Civil Action

CITY OF PHILADELPHIA, etc. et al.,
Plaintiffs-Respondents,

– and –

JOHN P. FAZZIO LANDFILL, INC.,
t/a JOHN P. FAZZIO LANDFILL
CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

RICHARD A. PELUSO, of full age, being duly sworn according to law, deposes and says:

1. I am a professional engineer licensed to practice in the State of New Jersey.

2. I hold a master's degree in Environmental Engineering, and have completed course work toward a doctor's degree in said field.

3. I am Vice President of Wehran Engineering Corporation which company specializes in the design of sanitary landfills and solid waste management in general.

4. I have examined the report entitled *Solid Waste: A Coordinated Approach*, 7th edition, prepared by the State of New Jersey County and Municipal Government Study Commission. This report is usually referred to as the Musto Report. This report takes the position, based upon certain acreage calculations of existing landfill sites that the available landfill acreage in New Jersey will be entirely exhausted by 1981, and that the landfills serving Bergen, Essex, Hudson, Passaic and Union Counties, which produce 48% of the State's annual volume of solid waste, will be exhausted in 1975.

5. The aforesaid calculations are based on inaccuracies and misconceptions of the landfill business. On page 4 of the report, it is stated that the calculations of landfill acreage are based upon an average depth of fill of 15 feet, including earth cover and minimal compaction. In actual practice throughout New Jersey, the average fill in major landfills is at least 40 feet.° This conclusion can be supported by examination of the engineering designs on file in the Department of Environmental Protection. I have personally been involved in engineering design of a significant number of landfills in New Jersey, and have personally made site inspections of a large percentage of the major landfill sites in the state, all of which support this conclusion. The significance of the variance in full results in substantial increase in the actual capacity of available landfill acreage as of 1972.

6. According to Table IV-1 on page 37 of the Musto Report, the available landfill acreage as of 1972 is 9,880 acres. To determine landfill capacity based on the assumption of 15 feet depth of fill, the Musto Report calculates that 783 acres of landfill space will be used up during the year of 1972, when in actuality, less than ½ of the acreage will be thoroughly used up. This is based on 40 feet rather than 15 feet fill. This will effectively extend the landfill life throughout the State of New Jersey from 1981 to approximately 1990.

7. In addition to the engineering designs on file with the Department of Environmental Protection and giving consideration to landfill designs previously filed with the Department but not yet taken into consideration in their calculations, together with landfill designs of which I have personal knowledge that are in the process of being developed, there is available as of November 25, 1975, approximately 180,000,000 in place cubic yards for disposal. The effect of this would be to extend existing landfill life expectancy to approximately 1986. This evaluation does not take into consideration other landfills presently being designed or contemplated by other engineering concerns, which will add to the presently known life expectancies. This conclusion is in harmony with the conclusion the Musto Report should have reached had it properly calculated the average depth of fill at 40 feet rather than 15 feet.

8. The waste generated in Pennsylvania and being disposed of in New Jersey is estimated at 10,000 tons a week. A 200 acre site brought to 50 feet elevation would satisfactorily handle this disposal for a period of approximately 15 years.

9. Sanitary landfilling of devastated areas resulting from mining operations is an ideal land reclamation project

if operated in accordance with the present Department of Environmental Protection rules and regulations. While there are no statistics available as to the amount of such devastated acres in New Jersey, it is readily apparent to an observer, and particularly to me, who specializes in waste disposal, that there are many sites throughout New Jersey that are ideally suited for this type of land reclamation in accordance with Department of Environmental Protection regulations. The use of such areas for landfill purposes would significantly increase the long-range capacity for waste disposal in New Jersey.

10. The Musto Report, on page 38, table 4, reveals that by the end of 1975, Bergen, Essex, Hudson, Passaic and Union Counties will have zero acres available. This, in fact, is not true since there are landfills in operation continuing in these areas.

11. On behalf of Interstate Waste Removal Co., Inc., I have submitted a preliminary engineering design to the New Jersey Department of Environmental Protection for a certain severely mined tract of land in Bordentown Township, Burlington County, New Jersey, comprising 93 acres and located upon Block 134, Lots 3, 4, and 14 as same appear on the Bordentown Township Tax Atlas.

12. When brought to final grade and cover, properly engineered and designed sanitary landfills are ideally suited for public recreational uses, and may also be used for specific commercial and industrial projects which have been considered at the time engineering plans and designs were filed with the New Jersey Department of Environmental Protection. In filing plans which contemplate commercial and industrial use, certain portions of the proposed landfill facility may be left untouched in order to avoid problems concerning support of heavy structures.

13. Sanitary landfilling may be used as an economical process to recover ravaged land. The recovery of land in this manner may have the dual advantages of recreating recreational space and green acres, while simultaneously providing a facility from which methane gas may readily be recovered and processed into natural gas and fed into the commercial gas system.

°Interpretation of the Notice of Public Hearing dated March 1975 issue of the New Jersey Register, Document #021-75-02 dated February 14, 1975 and signed by David Bardin, Commissioner of Environmental Protection indicates that 52 constituting the major landfill facilities within the State of New Jersey handle 80% of the solid waste disposed of in the State.

RICHARD A. PELUSO
Richard A. Peluso

Sworn to and subscribed before me this 25th day of November, 1975.

FLORENCE W. EDWARDS
Florence W. Edwards

Notary Public of New Jersey
My Commission Expires May 29, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

—

OCTOBER TERM

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No.

—

CITY OF PHILADELPHIA, et al.,
Petitioners,

v.

STATE OF NEW JERSEY, et al.,
Respondents.

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AFFIDAVIT OF MARVIN MAHAN.

(July 6, 1977.)

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STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

MARVIN MAHAN, of full age, being duly sworn according to law, upon his oath, says:

1. I am the Chairman of the Board of Scientific, Inc., a corporation organized and existing under the laws of the State of Delaware, and have personal knowledge of the matters contained herein.

2. Attached hereto is an affidavit filed with the Supreme Court of New Jersey and executed by me on November 25, 1975. All of the facts therein stated remain true except to the extent herein modified.

3. Kinsley's Landfill, Inc. and MAC Sanitary Landfill, Inc. are wholly owned subsidiaries of Scientific, Inc.

4. MAC Sanitary Landfill, Inc. having reached its designed capacity has been recently closed.

5. Kinsley's Landfill operates in Gloucester County, New Jersey. It owns approximately 335 acres, 65 of which are presently being used as a sanitary landfill under a certificate of registration approved by the New Jersey Department of Environmental Protection and a certificate of public convenience and necessity issued by the New Jersey Public Utility Commission.

6. On July 11, 1976, the engineering design for use of the balance of the acreage as a sanitary landfill was filed with the Department of Environmental Protection. It is anticipated that in due course registration for this additional acreage will be received. This expansion is predicated upon a continued sale of landfill space to Pennsylvania disposers.

7. The life expectancy of the section presently being operated is 2½ years.

8. Over 80% of the volume of refuse annually disposed of at this facility originates in the Philadelphia area. This company has a contract with the City of Philadelphia and it also serves many private haulers from the Philadelphia area. This company has a gross annual income of about $1,500,000.00. The costs of operating this facility are geared to the continued sale of landfill space to the City of Philadelphia and the private out-of-state haulers. Not only could this company not continue operations absent out-of-state sale of landfill space but in closing will suffer large financial losses. There is not a sufficient market available in New Jersey which would be attracted to this

area to off-set the losses occasioned by the loss of revenues coming from the Pennsylvania buyers of landfill space.

MARVIN MAHAN
Marvin Mahan

Sworn and subscribed to before me this 6th day of July, 1977.

FLORENCE W. EDWARDS
Florence W. Edwards
A Notary Public of New Jersey
My Commission Expires May 29, 1981

AFFIDAVIT OF MARVIN MAHAN.

(November 25, 1975.)

JAMIESON, MCCARDELL, MOORE, PESKIN and SPICER
A Professional Corporation
19 Chancery Lane
Trenton, N. J. 08618
(609) 396-5511
Attorneys for Plaintiffs-Respondents

SUPREME COURT OF NEW JERSEY

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DOCKET NO. A-82-74

September Term 1974

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Civil Action

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CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

———

Affidavit.

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

MARVIN MAHAN, of full age, being duly sworn according to law, upon his oath, says:

1. I am the Chairman of the Board of Scientific, Inc. a corporation organized and existing under the laws of the State of Delaware, and have personal knowledge of the matters contained herein.

2. MAC Sanitary Landfill, Inc. and Kinsley's Landfill, Inc. which operate sanitary landfill facilities in Gloucester County, New Jersey are wholly owned subsidiaries of Scientific, Inc.

3. MAC Sanitary Landfill, Inc. leases approximately 80 acres of land, of which approximately 36 acres are used for sanitary landfill purposes. Pursuant to engineering plans and designs heretofore filed with the New Jersey Department of Environmental Protection, it is anticipated at least 500,000 tons of solid waste can be disposed of at said sanitary landfill facility.

4. The site owned and operated by Kinsley's Landfill, Inc. is comprised of approximately 335 acres of land of which approximately 65 acres are presently used for sanitary landfill purposes. Preliminary elevation plans have been filed with the New Jersey Department of Environmental Protection for the entire remaining portion of the tract, and engineering plans and designs are in the process of being completed. It is presently anticipated that not less than 15,000,000 tons of solid waste can be disposed of at said landfill site.

5. In order for Kinsley's Landfill, Inc. to operate a sanitary landfill facility upon the aforesaid 65 acre tract,

it was required by the Department of Environmental Protection that certain environmental controls be provided for the site. Said evironmental controls cost approximately $500,000, almost all of which has been spent by Kinsley's.

6. At the time the aforesaid 335 acres were purchased for operation of a sanitary landfill by Kinsley's Landfill, Inc., and environmental controls were made upon the 65 acre portion of said tract, an agreement was reached with the City of Philadelphia for the disposal of solid waste originating in said City. The aforesaid 335 acre tract would not have been purchased and the environmental improvements thereto would not have been made in the absence of said agreement.

7. MAC and Kinsley presently have a contract with the City of Philadelphia for a minimum of 800,000 cubic yards (200,000 tons) and a maximum of 1,200,000 cubic yards (300,000 tons) which runs for 10 years and is of vital importance to the ability of MAC and Kinsley's to continue in operation.

8. In a study prepared for Gloucester County by Roy Weston, a consulting engineer, it was estimated that the total domestic solid waste generated in Gloucester County for the year 1975 would be 95,000 tons and that the projected domestic solid waste to be generated in said County during 1985 would be 150,000 tons.

9. There are presently 12 sanitary landfill facilities operating in Gloucester County, New Jersey.

10. Both the MAC and Kinsley landfills were planned and developed to handle primarily solid waste from Pennsylvania and the City of Philadelphia. At present, approximately 80 per cent of the total volume originates from either Pennsylvania or the City of Philadelphia. In the

event the out-of-state ban is enforced, it will be necessary to either close one or both of the landfills from lack of volume. In addition, it will be necessary to apply to the Public Utility Commission for a substantial increase to make up for the loss of revenue that will result from the exclusion of out-of-state refuse. Without such a rate increase, the landfill will not be able to operate.

MARVIN MAHAN
Marvin Mahan

Sworn to and Subscribed before me this 25th day of November, 1975.

ARTHUR MEISEL
Arthur Meisel
Atty. at Law of N. J.

IN THE

SUPREME COURT OF THE UNITED STATES

—

OCTOBER TERM

—

No.

—

CITY OF PHILADELPHIA et al.,
Petitioners,

v.

STATE OF NEW JERSEY, et al.,
Respondents.

AFFIDAVIT OF LEO F. HUGHES.

(July 6, 1977.)

STATE OF NEW JERSEY
COUNTY OF MERCER } *ss.:*

LEO F. HUGHES, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am President of Landfill and Development Company and have personal knowledge of the matters contained herein.

2. Landfill Development Company operates a sanitary landfill in Burlington County New Jersey. It operates under a certificate of approved registration issued by New

Jersey Department of Environmental Protection (D. E. P.) and also has a certificate of public convenience and necessity issued by the New Jersey Public Utility Commission.

3. The Landfill consists of 200 acres and is located in three municipalities, namely, Mount Holly, East Hampton and Lumberton Township.

4. Landfill Development Company commenced operations of the sanitary landfill at this site in 1969. For many years prior to this date, the City of Mount Holly operated a dump on this site and disposed thereon its municipal solid waste.

5. Many sections of this site, particularly the East Hampton section, had been used by the previous owners for sand and gravel mining.

6. In 1972, Landfill Development Company entered into a long term contract with the City of Philadelphia. Many private haulers from Philadelphia serving industrial and commercial establishments also used this landfill. The gross income from out-of-state users is in excess of $700,000.00 a year. Over 80% of the volume of refuse disposed at this landfill comes from the Philadelphia area.

7. This landfill also serves New Jersey communities as well as private haulers from New Jersey.

8. During the many years that Mount Holly operated the dump at this site there was no regulatory agency in New Jersey charged with protecting the environment. Consequently, many thousands of tons of waste of all descriptions were buried at this site during this period creating various environmental problems and health problems

primarily water pollution. The present operator, Landfill Development Company, has entered into an agreement with the New Jersey Department of Environmental Protection to upgrade this landfill in an effort to correct and eliminate the problems of the past. Landfill Development Company has committed itself to install environmental controls that will cost in excess of $1,000,000. Many of these controls are already installed. The controls are designed to eliminate aquifer contamination.

9. In addition to the costs of environmental controls, the economics of operating a landfill at this site requires the capital investment of $500,000.00 for heavy equipment, annual payroll in the neighborhood of $137,000.00 a year, maintenance and repairs of approximately $75,000.00 a year. There are many other costs of significance such as debt handling, insurance, engineering and engineering consultation, real estate taxes and the many other costs inherent in business operations of this size.

10. There is absolutely no way that this company can finance these necessary environmental controls and operate the landfill without the City of Philadelphia contract and the private Pennsylvania haulers. In relation to the overall costs of maintaining the site and operating under the conditions outlined above, the income received from New Jersey sources is so insignificant that this company would be forced to close the site. The section of Burlington County on which this site is located is relatively rural. There is no untaped potential market in New Jersey to make up for the loss of the sales of landfill space to Pennsylvania customers.

11. The life expectancy for this sanitary landfill at present annual volume is 20 to 25 years.

12. Department of Environmental Protection frequently inspects this landfill and recognizes it to be operated in an environmentally sound fashion.

LEO F. HUGHES
Leo F. Hughes

Sworn and subscribed to before me this 6th day of July, 1977.

ARTHUR MEISEL
Arthur Meisel
Att'y-at-Law of N. J.

AFFIDAVIT OF LEO F. HUGHES, 3rd.

(November 18, 1975.)

SUPERIOR COURT OF NEW JERSEY

Docket No. A-82-74

September Term 1974

Civil Action

CITY OF PHILADELPHIA, etc., et al.,
Plaintiffs-Respondents,

and

JOHN P. FAZZIO LANDFILL, INC., t/a JOHN P. FAZZIO LANDFILL CO., et al.,
Plaintiffs-Intervenors-Respondents,

v.

STATE OF NEW JERSEY, et al.,
Defendants-Appellants.

STATE OF NEW JERSEY
COUNTY OF MERCER } ss.:

LEO F. HUGHES, 3rd, of full age, being duly sworn upon his oath according to law, deposes and says:

1. I am President of Landfill and Development Company and have personal knowledge of the matters contained herein.

2. Landfill and Development operates a sanitary landfill in Burlington County, N. J. and is so certified by the

Public Utility Commission and Department of Environmental Protection.

3. Approximately 75% of the volume of refuse disposed of at this site comes from the City of Philadelphia.

4. This landfill also serves several New Jersey communities as well as private haulers in New Jersey who serve industry and commerce located in this state.

5. The operation of this landfill in compliance with the Department of Environmental Protection regulations requires a large dollar volume of business. Without the benefit of the Philadelphia contract this sanitary landfill operation will not be economically feasible.

6. It is likely that Landfill and Development Company will be unable, for financial reasons, to continue operating a sanitary landfill facility in the event it loses the volume of solid waste generated by the City of Philadelphia.

LEO F. HUGHES, 3rd
Leo F. Hughes, 3rd

Sworn to and Subscribed before me this 18th day of November, 1975.

FLORENCE MASSEY
Florence Massey
Notary Public of New Jersey
My Commission Expires March 16, 1977

AFFIDAVIT OF MILTON BERKES.

(January 29, 1974.)

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF DAUPHIN } *ss.:*

Milton Berkes being duly sworn upon his oath according to law deposes and says:

1) I am a Legislator from the 140th Assembly District of the Commonwealth of Pennsylvania elected from Bucks County.

2) I have personal knowledge of the matters contained herein.

3) I have, this twenty-ninth day of January, 1974, introduced into the House of Representatives of the Commonwealth of Pennsylvania a bill designated as House Bill No. 1831, a true copy of which is attached hereto and made a part hereof.

4) The intent of this legislation is to retaliate against any state that refuses to accept solid or liquid waste, for treatment or disposal, that originates within the Commonwealth of Pennsylvania.

MILTON BERKES
Milton Berkes

Sworn and subscribed to before me, a notary public of the Commonwealth of Pennsylvania this 29th day of January, 1974.

EUNICE F. JOHNSON
NOTARY PUBLIC
My Commission Expires Sept. 13, 1976
Hershey, Pa. Dauphin County

AN ACT

Amending the act of July 31, 1968 (P. L. 788, No. 241), entitled "An act providing for the planning and regulation of solid waste storage, collection, transportation, processing and disposal systems; requiring municipalities to submit plans for solid waste management systems in their jurisdiction; authorizing grants to municipalities; requiring permits for operating processing or disposal systems; imposing duties on and granting powers to municipalities; authorizing the Department of Health to adopt rules, regulations, standards and procedures; creating an advisory committee; providing remedies, prescribing penalties, and making an appropriation," prohibiting the treatment and disposal within the State of solid waste collected from a state that does not accept waste from this Commonwealth.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 6, act of July 31, 1968 (P. L. 788, No. 241), known as the "Pennsylvania Solid Waste Management Act," is amended by adding a clause to read:

Section 6. Powers and Duties of the Department.—The department shall have the power and its duty shall be to:

• • •

(10) Develop methods to identify the source of any solid waste which is part of the process of a solid waste management system to prevent any solid waste collected from another state that does not accept solid waste from this Commonwealth from being processed as part of such solid waste management system.

Section 2. Section 7 of the act is amended by adding a subsection to read:

Section 7. Applications and Permits.—• • •

(f.1) The department shall refuse any application from and shall not grant any permit to any person, municipality, county or authority which includes as part of its solid waste management system any solid waste collected from any location in another state that does not accept solid waste from this Commonwealth.

• • •

Section 3. Section 9 of the act is amended by adding, before the last paragraph, a clause to read:

Section 9. Prohibited Acts.—It shall be unlawful for any person, municipality, county, or authority to:

• • •

(9) Process as part of a solid waste management system any solid waste collected from any location in another state that does not accept solid waste from this Commonwealth.

• • •

Section 4. This act shall take effect immediately.